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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 RONI GILADI,

4 Plaintiff,

5 v.

94 CV 3976 (JPO)

6 BERISH STRAUCH, HARRIS
7 STERMAN, MONTIFIORE MEDICAL
8 CENTER, "JOHN DOE," "RICHARD
9 ROE," last two names being
fictitious, true names being
unknown,

10 Defendants.

11 -----x

12 New York, N.Y.
13 December 13, 2011
9:30 a.m.

14 Before:

15 HON. J. PAUL OETKEN,

16 District Judge

17 APPEARANCES

18 PHILIP J. DINHOFFER
Attorney for Plaintiff

19 WILSON ELSEER MOSKOWITZ EDELMAN & DICKER
20 Attorney for Defendants
GERARD JOSEPH HEUBEL

1CDFGIL1

1 (Trial resumed)

2 (In open court; jury not present)

3 THE COURT: Good morning, everyone. All set for the
4 jury?

5 MR. DINHOFER: We have a few matters to discuss.

6 THE COURT: Okay.

7 MR. DINHOFER: First of all, as I said yesterday, I
8 have some cases for your Honor regarding fraudulent concealment
9 cause of action from the Court of Appeals of the State of New
10 York. The first is Simcuski v. Saeli and I've highlighted in
11 yellow the relevant text, but the relevant part is that the
12 Court of Appeals says standing alone such non-disclosure or
13 concealment will not, however, serve as the basis for a
14 distinct cause of action in fraud.

15 THE COURT: Okay. I'll look at this later. We need
16 to get the jury going. Is there -- we'll look at this --

17 MR. DINHOFER: The other case also, where they say if
18 he had, he only pled malpractice, but there was a statute of
19 limitations issue, and they said it would have been okay in
20 dictum more or less, if he had been timely he would have had
21 his fraudulent concealment, equitable estoppel.

22 THE COURT: Anything else?

23 MR. HEUBEL: Yes, I --

24 MR. DINHOFER: I have something else. I'm sorry.
25 Judge I'm going to be going ahead with my client today, and I

1CDFGIL1

1 want to be sure we have some understanding. I was not allowed
2 to question Dr. Strauch with regard to his prior acts of
3 malpractice and I want to be sure counsel is not going to be
4 questioning my client about his prior lawsuit against Albert
5 Einstein College of Medicine for employment discrimination, I
6 think that the same rules that apply to why I couldn't go into
7 that with Dr. Strauch cover this case as well.

8 THE COURT: Mr. Heubel, are you going to be going into
9 that?

10 MR. HEUBEL: I'm not planning on going into it, except
11 to bring out that there was a prior lawsuit.

12 MR. DINHOFER: That's the whole point. The fact he
13 sued his employer has no relevance to this case.

14 THE COURT: Has it come up yet?

15 MR. DINHOFER: No.

16 MR. HEUBEL: I don't think so.

17 THE COURT: Wasn't there a motion in limine relating
18 to disability claim, and I think the ruling was that it was
19 excluded except if it's necessary to rebut something in
20 plaintiff's case. I don't think there's relevance to it.

21 MR. HEUBEL: Please note my exception.

22 THE COURT: Okay.

23 MR. DINHOFER: So we won't be hearing from that
24 transcript at all then. He won't pull that out. I couldn't do
25 it with the doctor with the malpractice transcript.

1CDFGIL1

1 MR. HEUBEL: I don't intend to do that.

2 MR. DINHOFER: Okay.

3 THE COURT: Anything else?

4 MR. HEUBEL: Just one thing. Counsel and I had agreed
5 to admit in evidence the records of Dr. Morton Spinner. I've
6 made copies of those and I'd like to have them marked and
7 admitted by stipulation.

8 THE COURT: Okay. Is that agreed upon?

9 MR. DINHOFER: Well, I did stipulate, your Honor, the
10 only thing, I wish counsel had done this sooner, I might have
11 used it when I was in that dark phase of my cross-examination
12 of Dr. Strauch. I was deprived of that opportunity because he
13 didn't bring it in any sooner, but I did agree to it.

14 MR. HEUBEL: We both had copies of it, Judge, and both
15 had an equal opportunity to do it.

16 MR. DINHOFER: That was your exhibit, not mine. You
17 said you were going to bring it in.

18 MR. HEUBEL: We stipulated --

19 MR. DINHOFER: You said you were going to bring it in.
20 I'm not disagreeing. It was stipulated.

21 THE COURT: You can bring it in.

22 MR. DINHOFER: I just wish you had done it sooner.

23 THE COURT: Anything else?

24 MR. HEUBEL: Can I pass this up?

25 THE COURT: Sure. Just leave it for Mr. Skolnik.

1CDFGIL1

1 MR. DINHOFER: Do you have a tag?

2 MR. HEUBEL: Are we up to 15?

3 MR. DINHOFER: You're marking it Defendant's B?

4 MR. HEUBEL: Defendant's B.

5 MR. DINHOFER: Then you can offer it in front of the
6 jury I guess at some point.

7 THE COURT: Okay. Anything else for now?

8 MR. HEUBEL: No, Judge.

9 THE COURT: Okay, you can bring the jury in.

10 (Pause)

11 THE COURT: A note from the jury.

12 MR. DINHOFER: I guess if the jury asks for the
13 exhibits we're not going to give them the redactions because
14 they could read what they couldn't read, right?

15 THE COURT: Well, we'll address that -- okay. I have
16 a note from the jury dated today, 12/13/11, 9:45 a.m. "Your
17 Honor" -- there are four points. Number one, Juror No. 5 will
18 not be able to attend on Monday, 12/19 and would prefer not to
19 be here on Friday 12/16 also. Two: Juror No. 2 would prefer
20 not to be here on Thursday after 3:30 p.m. Three: Juror No. 1
21 would prefer not to be here on Thursday after 2:00 p.m. Four:
22 Juror No. 8 would like to keep a firm 4:30 p.m. on Wednesday.
23 I assume that means a firm 4:30 p.m. appointment on Wednesday.

24 MR. HEUBEL: Appointment or --

25 MR. DINHOFER: End time. The end time we meet.

1CDFGIL1

1 MR. HEUBEL: It could be the end time, we're not sure.

2 THE COURT: Maybe it means a firm end time on
3 Wednesday.

4 I think what this means is we're at serious risk of
5 losing the jury. We told them five to seven days, I told them
6 five to seven days and they're getting antsy. I think we've
7 got to finish the evidence in this case tomorrow and get the
8 case to go to the jury on Thursday or tomorrow.

9 MR. HEUBEL: Judge, I've instructed my expert to be
10 here 9:30 sharp tomorrow and I don't see any reason why we
11 can't continue with him, and I may put Dr. Strauch on if my
12 case begins this afternoon, and that should not take up a lot
13 of time, but will take up some.

14 I think, though, your Honor was fairly accurate,
15 though. We've had I guess five days worth of testimony, so
16 you're still pretty much on the mark, I think.

17 MR. DINHOFER: We didn't work Friday.

18 THE COURT: No, that's true. Okay. So some of these
19 may be moot if we do finish Wednesday or early Thursday. I'm
20 hoping we finish Wednesday.

21 MR. DINHOFER: You could tell the jury just that fact,
22 we hope to get the case to them by late Wednesday afternoon or
23 early Thursday morning, depending on how it plays out.

24 THE COURT: Okay, you can bring them in.

25 (Continued on next page)

1CDFGIL1

1 (In open court; jury present)

2 THE COURT: Good morning, ladies and gentlemen.

3 Please be seated. I've received the note from your foreperson,
4 and I appreciate your continued patience and work on the case.
5 I understand that there are some scheduling issues that come up
6 and I will bear those in mind, and I've informed the parties to
7 bear those in mind. I do think, I do hope to get the evidence
8 completed by tomorrow so that the case, we're hopeful the case
9 will go to you, the jury, by the end of tomorrow or first thing
10 Wednesday or Thursday morning. Hopefully by the end of
11 tomorrow. We'll do our best to get the case to you and also
12 accommodate your scheduling issues. Okay?

13 So we're going to continue now with testimony still in
14 plaintiff's case, and this is, there was earlier testimony that
15 we began for scheduling reasons when Mr. Dinhofer was
16 questioning Mr. Giladi, the plaintiff in the case, and he's
17 going to be, I believe, continuing with that testimony now.

18 MR. DINHOFER: Before we do that, your Honor, there
19 was just one brief thing. I was going to request that the
20 Court take judicial notice of the following statutes. 18,
21 United States Code, Section 24, which is definition --

22 MR. HEUBEL: Judge --

23 THE COURT: You object to this?

24 MR. HEUBEL: Yes. I don't think that it's appropriate
25 that we do this at this point.

1CDFGIL1

1 THE COURT: We'll talk about this --

2 MR. DINHOFER: It's part of my case in chief, your
3 Honor. It has to be in evidence.

4 THE COURT: Well, I have to decide whether I'm going
5 to take notice of it.

6 MR. DINHOFER: Can we have a sidebar?

7 THE COURT: Not now.

8 MR. DINHOFER: Okay. Then we'll resume with
9 Mr. Giladi.

10 RONI GILADI,

11 called as a witness by the Plaintiff,

12 having been previously duly sworn, testified as follows:

13 THE COURT: Mr. Giladi, I remind you you're still
14 under oath from your previous testimony. You may be seated.

15 DIRECT EXAMINATION

16 BY MR. DINHOFER: (Continued)

17 Q. Good morning, Mr. Giladi.

18 A. Good morning.

19 Q. If I recall correctly when we left off you told us about
20 how you had awoken from surgery from the pain that you had.

21 The subsequent office visits, I believe we went through the two
22 or three office visits that you had with Dr. Strauch and my
23 notes indicate we were somewhere around the March 13 '92 office
24 visit?

25 A. Could be. I believe so.

1CDFGIL1

Giladi - direct

1 Q. Okay. Do you recall what occurred on that date? I'm sorry
2 if I'm repeating a little bit, but just to pick up from where
3 we left off, but do you recall what occurred on that date?

4 A. One second, please.

5 (Pause)

6 A. Yes.

7 Q. Could you tell us what occurred on that date?

8 A. I went to visit Dr. Strauch for followup. When I came to
9 his office I informed him that I -- this is a week or so after
10 my returning to work, like the first two weeks after returning
11 to work. I explained to him that I'm having a very difficult
12 time to perform my duties at work, and I'm barely able to use
13 my left hand and I am putting all the pressure of my duty on my
14 right hand and using my body as a -- I'm sorry.

15 (Pause)

16 A. Sorry.

17 Q. Take a second, please.

18 A. I told him that I -- it's very important for me to continue
19 with my job because I have kids to take care of, and I need his
20 help. I told him that I, during the physical therapy that I
21 was been instructed or being told by Mrs. Lang to do at home,
22 the home exercises she gave me. I'm doing the warm bath, but
23 the pain is not going away. I'm still having swollen, my hand
24 is still swollen a little bit. The sharp pain is still there.
25 The emission sensation is there, and I'm totally abusing my

1CDFGIL1

Giladi - direct

1 body because I have a lot of work with heavy equipment which I
2 cannot do with two hands and I have to use my right hand and my
3 body to be able to carry it.

4 He told me that I had to be patient because in the
5 type of surgery that I had it would take about nine to ten
6 months for recovery. At this moment I turned to him and I said
7 this is contradicted to what you told me before the surgery.
8 You never told me that. You told me that within three to four
9 weeks, tops, four weeks, I will be at work in full steam and I
10 would be like I was the day I was born. I don't feel so. He
11 told me be patient, you're doing very well, you're improving
12 fine, and I will see you the next visit.

13 Q. There were two things that you mentioned in there that I
14 just want to come back to for a second. One is that you
15 mentioned at this point of this visit you had returned to work.
16 Do you remember when it is that you actually returned to work?

17 A. I believe maybe the 9th or the 8th of March. I cannot tell
18 you exactly the dates, but I think around the neighborhood
19 between the 5th to the 9th.

20 Q. Was that more or less the date that was on the third form,
21 the third disability form, whatever that date was?

22 A. Could be.

23 Q. And the other thing you mentioned was a physical therapist,
24 Ann Lang?

25 A. Yes, Ann Lang, when I was at his office in January, when

1CDFGIL1

Giladi - direct

1 Dr. Strauch took the cast off, and he looked at my hand, I was
2 asking him or he refer, I do not recall exactly what happened,
3 but I went to the physical therapy and he told me that he would
4 like to go to his physical therapist which I went to her and I
5 was in her office and I was only once in with her in her
6 office. It was never a second visit was scheduled and she gave
7 me what's called home exercise to do, which I followed up
8 religiously.

9 Q. Now, over the next few months, did you continue to see
10 Dr. Strauch?

11 A. Religiously, the way he told me to do.

12 Q. And do you have any notes showing when you next saw
13 Dr. Strauch?

14 A. As I said before, I don't have all the notes that I -- I
15 did not find all the notes, but my next notes go into July 30,
16 1992.

17 Q. Okay. Well, let's go back, because Dr. Strauch, if I
18 recall correctly, we saw in his notes that you were there on
19 April 3rd of 1992. Did anything different occur, to your
20 recollection, on April 3rd of '92 than on any of the prior
21 visits?

22 A. The next time, each time, each and every time I went to
23 Dr. Strauch I complained about the same things about burning
24 feeling, diminished sensations, difficulty to use the hands,
25 pain, sharp pain at the elbow. I cannot be around people

1CDFGIL1

Giladi - direct

1 because every touch to the elbow I will jump and I will have, I
2 will be have a lot of pain and discomfort for a long period of
3 time, and his response was on a regular basis, you're doing
4 well, be patient.

5 Q. And would the same be true in May of '92 when you saw
6 Dr. Strauch?

7 A. Yes.

8 Q. And would the same be true in July of '92 when you saw
9 Dr. Strauch?

10 A. Yes.

11 Q. And during this next four-month period of time, are you
12 back at work?

13 A. I was working and I was struggling and the people I'm
14 working with are mostly from the neurology department at
15 Montefiore on a regular basis do not understand what happened
16 to me that I'm not the same person I used to be before
17 December. They know me as a very eager --

18 MR. HEUBEL: Objection as to what other people thought
19 or said. Hearsay.

20 THE COURT: That's sustained. Please just testify to
21 what you know and not what you surmise other people were
22 thinking or feeling.

23 A. Since I came back to work, I was not doing my work the way
24 I used to. Things taking me longer. And in many cases I had
25 to even -- if I had a case supposed to start at 8:00 in the

1CDFGIL1

Giladi - direct

1 morning I had to come three hours prior to the case to be able
2 to get things ready if I want the surgery to start on time.

3 Q. And before Dr. Strauch's surgery, what time would you have
4 arrived and have started on time?

5 A. A half hour, 45 minutes tops before surgery.

6 Q. Did there come a time in July of 1992 -- withdrawn. Did
7 there come a time in May of '92, I'm sorry, or during this
8 period of time between April and July of '92 where you sought
9 out other medical opinions?

10 A. Yes.

11 Q. Why is that?

12 A. Because I felt there's something wrong with me and I want
13 to know what's going on and I find out that the doctors who did
14 the surgery on me --

15 MR. HEUBEL: Objection.

16 THE COURT: Wait for the next question.

17 MR. DINHOFER: He was answering the question. I don't
18 know what the objection was. I asked him why --

19 MR. HEUBEL: I thought he started to say, Judge, and I
20 found out -- I may have misheard that.

21 THE COURT: Hold on a second. Yes, the question was
22 did there come a time between April and July of '92 when you
23 sought out other medical opinion.

24 MR. DINHOFER: And then why is that, and he was
25 telling us why.

1CDFGIL1

Giladi - direct

1 THE COURT: Why did you seek out other medical
2 opinions?

3 THE WITNESS: Because I was not -- because my
4 complaint was not being addressed by the physician I'm going
5 to.

6 Q. The physician you're going to, meaning Dr. Strauch?

7 A. My surgeon.

8 Q. Meaning Dr. Strauch?

9 A. Yes.

10 Q. Who did you see?

11 A. I saw Dr. Goodrich.

12 Q. And when did you go see Dr. Goodrich?

13 A. I think a week or two or in this neighborhood. After I saw
14 Dr. Strauch, I think after the July visit with Dr. Strauch.

15 MR. DINHOFER: If I may, one second here.

16 (Pause)

17 Q. Prior to seeing Dr. Goodrich, do you remember going for an
18 EMG test?

19 A. I saw Goodrich in '92. Yes, I went to see Dr. -- I saw
20 Dr. Sadeh in Israel in November of 1992 -- '91.

21 Q. That's December of '92. In May of 1992 do you remember
22 seeing a Dr. Jerry Kaplan?

23 A. Yes.

24 Q. Who is Dr. Jerry Kaplan?

25 A. He's a neurologist at Albert Einstein College of Medicine.

1CDFGIL1

Giladi - direct

1 MR. DINHOFER: All right, and for the record we have
2 Dr. Kaplan's records in evidence as Exhibit 4.

3 Q. And how is it that you came to see Dr. Kaplan in 1992?

4 A. I know Dr. Kaplan for many years and I had a job at
5 Einstein and when I was there I saw Dr. Kaplan and through our
6 conversation he told me --

7 MR. HEUBEL: Objection.

8 THE WITNESS: I stopped.

9 THE COURT: Sustained.

10 Q. Well, did you see Dr. Kaplan back in '87 when you had the
11 median nerve injury?

12 A. I did.

13 Q. And did you see him prior to that when you had a car
14 accident?

15 A. I know him since '83.

16 Q. Okay. And could you tell us how many different EMG's has
17 Dr. Kaplan taken of you over the years?

18 A. I believe a total of no more than four or five.

19 Q. Okay. And do you know what the results were of the EMG
20 that Dr. Kaplan performed on you?

21 A. Dr. Kaplan, which I learned about the results, that he --

22 MR. HEUBEL: Objection.

23 THE COURT: Sustained.

24 MR. DINHOFER: Okay.

25 Q. When you saw Dr. Kaplan, was there any recommendation for

1CDFGIL1

Giladi - direct

1 treatment?

2 MR. HEUBEL: Objection.

3 THE COURT: I think it's hearsay. Sustained.

4 MR. DINHOFER: Okay.

5 Q. Did Dr. Kaplan perform any treatment?

6 A. He did an EMG.

7 Q. Okay. What was your next course of action following seeing
8 Dr. Kaplan?

9 A. I saw Dr. Goodrich.

10 Q. And what did Dr. Goodrich do for you?

11 A. He took a history. He did a physical examination and
12 during the physical examination he determined that I have
13 injury to the nerve.

14 MR. HEUBEL: Objection.

15 THE COURT: Sustained.

16 MR. HEUBEL: As to what Dr. Goodrich determined.

17 MR. DINHOFER: His records and reports are in
18 evidence, your Honor.

19 MR. HEUBEL: And that's all that's in evidence, Judge.

20 THE COURT: Yes. I don't think he could testify to
21 what Dr. Goodrich told him because that would be hearsay.

22 MR. DINHOFER: I don't think he was telling what he
23 told him.

24 THE COURT: If it's in evidence, he can read from the
25 document.

1CDFGIL1

Giladi - direct

1 Q. Are you able to see on the monitor the July 27, 1992 report
2 of Dr. Goodrich?

3 A. Yes. He's writing exactly what I told him, that I gave him
4 a history, dated back to 1987, then he said that he underwent
5 surgery after EMG documented ulnar neuropathy by Dr. Strauch in
6 December of 1991 --

7 MR. HEUBEL: Objection. Judge, the witness was asked
8 a question and now he's reading from a document. It's either
9 his testimony if it's permissible or we have the document.

10 THE COURT: What was the question, counsel?

11 MR. DINHOFER: I'll move on, your Honor.

12 THE COURT: Okay.

13 Q. Well, in the second paragraph of this report, Dr. Goodrich
14 states: So in summary, what we have is a man status post ulnar
15 nerve transposition with neuroma or injury to the ulnar nerve
16 itself. Did Dr. Goodrich communicate that information to you?

17 A. Yes.

18 Q. And then he says I have recommended to Roni that he have it
19 reexplored to find out what has happened to the nerve and to
20 rule out a neuroma. Did Dr. Goodrich communicate that
21 information to you?

22 A. Yes.

23 Q. Based on that information that was communicated to you by
24 Dr. Goodrich, what did you next do?

25 A. I did what Dr. Goodrich told me to do and I went back to

1CDFGIL1

Giladi - direct

1 Dr. Strauch.

2 Q. To this point in all the conversations you had with
3 Dr. Strauch, has he ever told you that you did not have an
4 ulnar nerve transposition on December 11 of 1991?

5 A. December 12.

6 Q. December 12, I'm sorry, December 12 of 1991.

7 A. No.

8 Q. So when do you next see Dr. Strauch after Goodrich?

9 A. I believe in August.

10 Q. Okay. And did you communicate to him at that time that you
11 had been seen by Dr. Goodrich?

12 A. I believe I told him, I do not know if I said clear
13 Dr. Goodrich, because Dr. Goodrich was not comfortable with the
14 issue because Dr. Strauch is boss.

15 MR. HEUBEL: Objection. Objection and move to strike.
16 Unresponsive and hearsay.

17 THE COURT: It's statements in the form of treating,
18 so I think that that's a hearsay exception, so I'll allow it.

19 Q. Okay. Can you repeat that answer, because I'm not sure we
20 heard it over the objection.

21 A. Dr. Goodrich was uncomfortable with situation --

22 MR. HEUBEL: Objection.

23 A. Because Dr. Strauch is boss in one area of his profession.

24 THE COURT: The objection is sustained as to
25 statements about what Dr. Goodrich told the plaintiff. He can

1CDFGIL1

Giladi - direct

1 testify to what he said to Dr. Goodrich, but not to what
2 Dr. Goodrich said to him or what he was thinking.

3 MR. HEUBEL: And I ask, Judge, also that it be
4 stricken.

5 MR. DINHOFER: I'm asking why he didn't mention it,
6 and all he's saying is because Strauch was the boss he's
7 uncomfortable about getting involved in that. That's not
8 communicating any statements. It's the fact of why he didn't
9 do what he said to do.

10 THE COURT: It's testifying to a statement of Dr.
11 Goodrich or what Dr. Goodrich was thinking or feeling.

12 MR. DINHOFER: He could have knowledge of that
13 personal relationship as well, your Honor.

14 THE COURT: But he can't testify to what Dr. Goodrich
15 is comfortable or not comfortable with, so the jury is
16 instructed to disregard insofar as it states anything about
17 what Dr. Goodrich was thinking or was comfortable with or not
18 comfortable with.

19 Q. What occurred on the occasion of the visit with
20 Dr. Strauch, if anything, different from any of the prior
21 visits?

22 A. No, nothing different.

23 MR. DINHOFER: Did you say something, Gerry?

24 MR. HEUBEL: You know I didn't say anything.

25 MR. DINHOFER: I'm sorry, I thought I heard something.

1CDFGIL1

Giladi - direct

1 It must have been outside. I thought it was you.

2 A. I may ask Dr. Strauch, I do not remember exactly when, for
3 a letter to the military in Israel.

4 Q. I'm sorry?

5 A. I asked him, I may asked him for some document that I would
6 be excused from military service in Israel.

7 Q. Okay, and why is that?

8 A. Because my condition was not -- I was not in a position
9 where I could serve in military duties and in order for me to
10 be excused if I'm in the country and an emergency occurred and
11 I would need to be in service, that I don't want to be at all
12 in the military, so I have to have something in my hand to tell
13 them why I cannot serve in the Army.

14 Q. And did Dr. Strauch give you such a note?

15 A. Yes, he did.

16 Q. And is that the note we saw in the file, I believe that was
17 in October or November?

18 A. Something like that.

19 Q. Of '92?

20 A. Yes.

21 Q. If I recall correctly, if I can find it --

22 (Pause)

23 Q. I'm sorry, September 1, '92. Is this the note that
24 Dr. Strauch gave you?

25 A. I believe so, yes.

1CDFGIL1

Giladi - direct

1 Q. And again, does this note indicate that Dr. Strauch is
2 telling you that, in the third paragraph, that you underwent a
3 transposition --

4 A. He made that clear that on December 12, 1991 I underwent a
5 transposition of the ulnar nerve at the elbow.

6 Q. And again to the point of this note, can we agree as of
7 this time still no one has told you that you did not in fact
8 have an ulnar nerve transposition?

9 A. No. The letter itself states very clear I did a
10 transposition and this letter I'm going to provide it to an
11 authority overseas, so it is clear to me at that time, even if
12 he implied in any way, it's clear to me that a transposition
13 was never being done.

14 Q. The transposition was done?

15 A. Never done. Sorry, the transposition was done.

16 Q. Okay. Now, going through September, October, November, and
17 you continued during those months to see Dr. Strauch?

18 A. I saw him in October, and in October I clearly indicated to
19 him that I was, during my work I'm talking with other
20 neurologists that I'm working with. I told him that all of
21 them --

22 MR. HEUBEL: Objection.

23 MR. DINHOFFER: I told him?

24 MR. HEUBEL: All of them.

25 MR. DINHOFFER: He told him.

1CDFGIL1

Giladi - direct

1 THE WITNESS: I'm talking what I said to Dr. Strauch.

2 THE COURT: Are you saying I told him, Dr. Strauch?

3 THE WITNESS: I'm talking with regard to Dr. Strauch,
4 I'm now in the office with Dr. Strauch and I'm explaining what
5 I said to Dr. Strauch.

6 THE COURT: Okay.

7 A. I told Dr. Strauch that all the neurologists I'm working
8 with indicating that I have some problem with my hand, and
9 should be --

10 MR. HEUBEL: Objection.

11 THE COURT: Overruled. You may continue.

12 A. Should be a little bit explored. Dr. Strauch told me that
13 I am talking with too many peoples, I should stop consulting
14 with everybody that I see. I'm doing very well. He said to me
15 you don't have any problem. If you have any problem, you have
16 it in your head because you're a hypochondriac. I stopped for
17 a second and I said, "What did you say?"

18 He said, "You're a hypochondriac, you have no
19 problem."

20 I said, "I'm not a hypochondriac. I have problem. I
21 have pain. I cannot see my kids. Because they're not allowed
22 to come to my left side. They like to play with me, I cannot
23 play with them. Don't tell me I am a hypochondriac."

24 I felt like lost. I did not know what to do any more.
25 After leaving his office, I took five weeks vacation to search

1CDFGIL1

Giladi - direct

1 to see what is going on with me.

2 Q. And when you took this vacation, where did you go?

3 A. I went to Israel.

4 Q. And when you were in Israel on this vacation, this would be
5 roughly, I guess December of '92?

6 A. I went, yes, I think December, January. I think the last
7 week of November, maybe part of all December and part of
8 January, beginning of January, a few weeks in January.

9 Q. And did you see any doctors while you were in Israel?

10 A. Yes. I saw a neurologist.

11 Q. Who is that?

12 A. Dr. Sadeh.

13 Q. We have Dr. Sadeh's records in evidence as Plaintiff's
14 Exhibit 6. And can you tell us what did Dr. Sadeh do for you
15 when you saw him?

16 A. He took a history. He did a physical examination and he
17 did an EMG.

18 Q. And where it says diagnosis in Dr. Sadeh's report of
19 December 31, 1992, that's in evidence, where it says diagnosis
20 bilateral carpal tunnel syndrome, ulnar neuropathy most
21 probably due to injury at elbow, did Dr. Sadeh communicate that
22 information to you?

23 A. Yes.

24 Q. Following that visit with Dr. Sadeh, what did you next do?

25 A. I came back to Dr. Strauch.

1CDFGIL1

Giladi - direct

1 Q. For what purpose?

2 A. To report to him what happened in Israel. He is my
3 physician.

4 Q. When you went to see Dr. Strauch, did you bring with you a
5 copy of Dr. Sadeh's report and EMG?

6 A. I had it with me.

7 Q. Did you attempt to show that report to Dr. Strauch?

8 A. Yes, but he refused.

9 Q. Refused what?

10 A. He said to me that this EMG was done on different machines
11 than the one prior to surgery and this is not going to reflect
12 anything for him or give him any information, but he asked me
13 to take Dr. Berg's report --

14 Q. Berger?

15 A. Berger's report and send it to the doctors in Israel for
16 comparison. He also told me that he would like me to have the
17 EMG repeated with the same doctors I did preop. I asked him if
18 you claiming that the doctors, that you cannot see -- this
19 report is not going to help you in any way because it's done on
20 different machine and different operator, how this report is
21 going to be any value to Dr. Sadeh for comparison. And I told
22 him that there's no point for me to have EMG within few weeks
23 one from each other, especially when the information it's
24 giving me isn't contradicted, because on the one hand he cannot
25 compare, but Dr. Sadeh can compare.

1CDFGIL1

Giladi - direct

1 So he told me that I cannot -- he is not going to see
2 me for my hand until I do the EMG with Dr. Berg. So I feel at
3 this time that I lost my physician.

4 Q. What do you mean by I lost my physician?

5 A. I can't -- I'm not going to do the EMG. There's no point
6 for me to do another EMG with him. It's not an easy test.

7 Q. What does EMG entail?

8 A. Sorry, in this, in this meeting I had also another thing
9 from Dr. Strauch that I would like to go over it.

10 Q. All right, we'll go back to that, then. Tell us what
11 happened in the meeting with Dr. Strauch.

12 A. You have needles being stucked to your hand, electroshock
13 was being given. It's not comfortable test.

14 Q. When they administer the electric shock at the elbow, how
15 did they go about doing that?

16 A. They go to the area of the nerve and they stimulate the
17 nerve and measure the speed or whichever, I'm not a
18 neurologist, and they take that measure and measuring and then
19 write. Dr. Sadeh it was computerized, he did not do anything,
20 everything was in the computer.

21 Q. How do they stimulate the nerve?

22 A. With the electric shock.

23 Q. And can you show us on your good arm where they actually
24 put the probe that they touch to your nerve in order to
25 stimulate it?

1CDFGIL1

Giladi - direct

1 A. Here for the ulnar nerve and here for the median nerve.

2 Q. Do they ever go behind the --

3 A. They went the other --

4 Q. The elbow.

5 A. Anatomic where the nerve is supposed to be the day you're
6 born.

7 Q. By the groove?

8 A. By the groove, yeah.

9 Q. They don't go any higher than the groove?

10 A. I cannot tell you exactly the site, I think it's near the
11 groove, this area from there.

12 Q. Well, let me ask you this way, maybe we can do it just to
13 jump ahead for a quick second. From the site where you now
14 know you had the neuroma --

15 A. I think it was below it.

16 Q. It's below the neuroma where they're putting the
17 electrodes?

18 A. I believe.

19 Q. Okay.

20 A. I wanted to say one thing about the meeting that I had with
21 Dr. --

22 Q. Yes, I was going to come back to that now. Could you tell
23 us what you wanted us to know about the January 1993 meeting
24 that you had with Dr. Strauch?

25 A. During this meeting I told Dr. Strauch, I questioned

1CDFGIL1

Giladi - direct

1 Dr. Strauch if the nerve was being transposed how the
2 neurologist can do the EMG the way it was being done to me for
3 the last, for the prior EMG's, because if the nerve was being
4 transposed and you put an electrode there, you're not going to
5 get any result because the nerve is not supposed to be there.

6 At this moment Dr. Strauch took his office notes or
7 book, my chart, he look at the chart and he said to me, I do
8 not know. Based on my chart, you did not have a transposition.
9 But based on the surgical report you did have a transposition.

10 I said to him, "So what really happened?"

11 He said, if I'm -- I do not remember word by word
12 exactly, but my understanding from all the conversations that I
13 had with him that something happened in the OR and he start to
14 stumble with the conversation and then he told me, he start to
15 do, took my hand, start to do examination, changed the subject
16 totally and he told me what he told me about next time I should
17 come to him only if I do the EMG.

18 But I still at this point, I do not know if done, not
19 done or what happened in the OR during my surgery.

20 (Continued next page)

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1CDZGIL2

Giladi - direct

1 BY MR. DINHOFER:

2 Q. From January of '93 to the present date, have you ever
3 returned to Dr. Strauch for your left arm?

4 A. For my left, no. I went to him when I have problem with my
5 right hand, carpal tunnel syndrome because of the stress I put
6 on my hand as a result that over use it because of my
7 condition.

8 Q. And why at this point in time did you go see Dr. Strauch,
9 having had all the experiences that you had with him?

10 A. I didn't hear the question, sorry.

11 Q. I'm sorry. You knew there was something wrong with your
12 left side and Dr. Strauch wasn't being straight forward with
13 you. Is there a reason why you went to see him for the right?

14 A. Why?

15 Q. Yeah.

16 A. Because what my thought at that time, I do not -- not
17 exact. But I know that I went to him to give him another
18 chance, maybe during this examination he will do something, he
19 will tell me the truth what happened in the OR, because I
20 really wanted to know what going on in OR. I had Doctor that I
21 saw that told me that I have injury --

22 MR. HEUBEL: Objection.

23 THE COURT: The objection is to form or --

24 MR. HEUBEL: The Doctor that told me.

25 THE COURT: Okay.

1CDZGIL2

Giladi - direct

1 MR. HEUBEL: Sounded like another Doctor told me,
2 Judge.

3 THE COURT: Yeah, if you're going to -- please don't
4 testify as to what another doctor might have said, but if you
5 testify to your own.

6 MR. DINHOFER: I think he's talking about what he said
7 he's communicating to the doctor in the course of treatment.

8 THE COURT: If you're communicating to your doctor,
9 you can testify to that.

10 A. The question is why I went back to him.

11 Q. Yeah. When was that that you went back to him, first of
12 all?

13 A. I went back to him in October, and last visit with Dr.
14 Strauch.

15 Q. October of '93?

16 A. Yes.

17 Q. And between October of '93 and January of '93, about how
18 many different doctors did you see with regard to your left
19 arm?

20 A. I saw one, two, three -- I think three doctors.

21 Q. Okay.

22 A. Or so.

23 Q. Do you know who they were?

24 A. The first one was Dr. Spinner.

25 Q. Okay. Who is the next doctor?

1CDZGIL2

Giladi - direct

1 A. The next doctor was Dr. Beasley.

2 Q. Okay. Who is the next doctor?

3 A. I think I went back to doctor -- I think I saw somebody in
4 Israel, Doctor Ester Lipsker or something like that?

5 Q. Okay.

6 A. I think so. I saw doctor -- also I did not see him, but we
7 were discussing things at the office, Doctor Goodrich -- Doctor
8 Kantowitz, he's a neurologist that I'm working with, I work
9 with him very heavily.

10 Q. So we got Kantowitz. Did you see Dr. Goodrich during this
11 time?

12 A. I saw him in May, I believe so.

13 Q. Okay. And does the name Dr. Beasley refresh your
14 recollection?

15 A. I say say him in, I saw Beasley in, I believe in April.

16 Q. Okay. So in the span of roughly ten months from January of
17 '93 to October of '93, when you went back to Dr. Strauch?

18 A. Sorry. I saw Dr. Rousso also.

19 Q. Dr. Rousso too, okay. You saw about six different doctors,
20 seven different doctors that you mentioned?

21 A. Something like five, six.

22 Q. Okay. Let's go through some of these doctors then that you
23 saw. One that you saw was a Dr. Spinner?

24 A. Yes.

25 MR. DINHOFFER: Okay. And I didn't know if we formally

1CDZGIL2

Giladi - direct

1 moved it, but we had it marked for identification and agree
2 it's in evidence as Exhibit B, defendant's B.? It's Dr.
3 Spinner's records?

4 MR. HEUBEL: So stipulated.

5 MR. DINHOFFER: In evidence.

6 Q. Had you seen Dr. Spinner prior to seeing him in 1993?

7 A. Yes, I saw him after my '87 surgery.

8 Q. Okay. And what part, if any, did Dr. Spinner play in your
9 recovery from the 1987 surgery?

10 A. He was dealing with the bicep hematoma that I had and the
11 effects from it and from the median nerve.

12 Q. Okay. And what kind of treatment did he give you back in
13 '87?

14 A. Physical therapy.

15 Q. And was the physical therapy that Dr. Spinner sent you for
16 back in '87 for the injury that you had to the branch of the
17 median nerve, was that successful?

18 A. Yes.

19 Q. And you saw him in 1993?

20 A. Only for one visit.

21 Q. Okay. I show you on the screen now the report of Dr.
22 Spinner. When you saw Dr. Spinner, did he test your grip
23 strength?

24 A. Yes.

25 Q. And the report indicates he used a dynamometer, is that

1CDZGIL2

Giladi - direct

1 correct; he tested your grip strength with a dynamometer?

2 A. Yes. He use it like five or six times, not only once. He
3 did back and forth, back and forth back, and for the long time.

4 Q. Okay. And did he do it for grip and for pinch for the
5 different muscles that he was testing?

6 A. Yes.

7 THE COURT: Mr. Dinhofer, is this in evidence?

8 MR. DINHOFER: Yes, it is.

9 THE COURT: And what is this?

10 MR. DINHOFER: This is from -- we just moved it into
11 evidence, this is defendant's B.

12 THE COURT: Defendant's exhibit B?

13 MR. DINHOFER: Yeah.

14 THE COURT: And this is -- there is no objection to
15 this?

16 MR. HEUBEL: Stipulated.

17 MR. DINHOFER: By stipulation, your Honor.

18 THE COURT: Okay, it's received in evidence.

19 (Defendant's Exhibit B received in evidence)

20 THE DEPUTY CLERK: Thank you.

21 MR. DINHOFER: Okay, officially do that. I'm sorry.

22 Q. Okay. And where Dr. Spinner tells you -- states, rather --
23 where is it -- that there was a neuroma -- where did I see it?
24 Oh, there it is. Neuroma of the medial cutaneous nerve of the
25 forearm, did he communicate that information to you?

1CDZGIL2

Giladi - direct

1 A. The thing that I -- that what he say -- I'm sorry. The
2 only thing what been told neuroma, I did not -- when he was
3 touching here, my understanding is he feeling a neuroma.

4 Q. Okay. And then he said, towards the end -- did he
5 communicate this to you -- that you would need a sub-muscular
6 transposition of the ulnar nerve?

7 A. Yes, he did.

8 Q. And did you have any response to that?

9 A. If I have any response?

10 Q. To Dr. Spinner when he told you that you would need a
11 transposition?

12 A. I ask him why I need to have a transposition if I had one
13 already.

14 Q. Okay. And were you satisfied with the response that Dr.
15 Spinner gave you to that question?

16 A. I was confused by it.

17 Q. Did Dr. Spinner make any plans to do surgery on you?

18 A. He per se, no.

19 THE COURT: He what?

20 Q. He didn't make plans on you?

21 A. No.

22 Q. Okay.

23 A. I was best on the information I should go to have surgery
24 to seek for surgery, but he, himself, did not want to do the
25 surgery.

1CDZGIL2

Giladi - direct

1 MR. HEUBEL: Objection, ask that be stricken; again
2 testifying as to what was going on in the mind of Dr. Spinner.

3 MR. DINHOFER: I don't believe that's at all what he
4 said about his state of mind, your Honor. He's just stating as
5 a matter of fact he didn't want to do the surgery.

6 MR. HEUBEL: I don't understand the difference, Judge.

7 MR. DINHOFER: I asked him if he had plans, and this
8 is what the plan was. This is not a statement of the doctor.

9 THE COURT: Well, I'll allow it.

10 MR. HEUBEL: Judge --

11 MR. DINHOFER: Thank you, your Honor.

12 Q. Okay. I think the next doctor you mentioned in sequence
13 would be Dr. Kantowitz?

14 A. Yes.

15 Q. And can you tell us who is Dr. Kantowitz?

16 A. Dr. Kantowitz is a neurologist, neurosurgeon who I know for
17 many many years during my affiliation with the Albert Einstein
18 College of Medicine and Montefiore Medical Center.

19 Q. Okay. And what did Dr. Kantowitz do for you?

20 A. I told Dr. Kantowitz that I'm totally confused, I do not
21 know any more if transposition was being done or not done. I
22 believe my surgeon, the transposition was being done. But my
23 physician also -- my surgeon also told me that the possibility
24 was not done. I see other doctors who told me the
25 transposition was not done. I said to him, do you mind to

1CDZGIL2

Giladi - direct

1 confirm it for me with an MRI, so once for all I will get an
2 answer where my nerve is. He say no problem. I will have
3 answer. I told him that they, there is a suspicion that I have
4 a neuroma in the area. He say, if this is the case, we need to
5 do an MRI with contrast. So he scheduled for me an MRI with
6 contrast.

7 And when I went to do the MRI, somehow after
8 discussing between the radiologist and Dr. Kantowitz, the
9 contrast was being removed from the prescriptions.

10 Q. Okay. We have in evidence as plaintiff's exhibit number
11 seven, MRI films. Is this the MRI that Dr. Kantowitz sent you
12 to have?

13 A. Yes.

14 Q. And as part of plaintiff's Exhibit one, the hospital
15 record, we have the report of the radiologist?

16 A. Yes, yeah.

17 Q. Is that the report that you were familiar with from the
18 radiologist regarding the MRI that you had back in --

19 A. March 3rd, '93.

20 Q. Yes. Thank you for finding the date.

21 A. Yes.

22 Q. Okay.

23 A. I also -- Dr. Kantowitz show me the -- after he received
24 the MRI, showed me the MRI, and he point to two pictures.

25 MR. HEUBEL: Judge -- withdrawn.

1CDZGIL2

Giladi - direct

1 A. Which is CAT number I think 8 13 and 1313.

2 Q. 8 of 13 and 13 of 13?

3 A. Yes.

4 Q. Yeah.

5 A. And when I was looking at that, it was some fat around the
6 nerves, which was unclear why, some thickness -- I'm not a
7 neurologist, I can not, but just two picture was important for
8 him to show me.

9 Q. Okay.

10 THE COURT: Would this be a good time for a quick
11 break.

12 MR. DINHOFER: Sure.

13 THE COURT: Okay, let's do a five minute break.

14 (Recess)

15 (Continued on next page)

1CDZGIL2

Giladi - direct

1 (In open court; jury not present)

2 THE DEPUTY CLERK: Judge entering.

3 THE COURT: Bring back the jury.

4 MR. HEUBEL: Judge, can I ask, before the jury comes
5 in, that when documents are up in his testimony, that's fine,
6 but that they not be --no testimony about that particular
7 document going on, we're going to overly emphasize something,
8 that shouldn't remain up on the screen.

9 So I'm asking that when counsel is finished with the
10 document --

11 THE COURT: Yes, that's true. When you're finished --

12 MR. DINHOFER: I'm trying to do that.

13 THE COURT: When you're finished talking about a
14 document, remove it from the screen, that's right.

15 MR. DINHOFER: I cover them, uncover. I move them
16 back and forth. It's just --

17 THE COURT: Yes.

18 MR. DINHOFER: In the moment you don't pay particular
19 detail.

20 THE COURT: Okay.

21 THE DEPUTY CLERK: Jury entering.

22 THE COURT: You may be seated.

23 (Continued on next page)

1CDZGIL2

Giladi - direct

1 THE COURT: You may continue, Mr. Dinhofer.

2 MR. DINHOFER: Thank you, your Honor.

3 Q. Okay. So after the MRI's with Dr. Kantowitz, I believe the
4 next in your sequence is a Dr. Beasley?

5 A. Yes.

6 Q. Can you tell us who Dr. Beasley is?

7 A. He's a surgeon from NYU, if I'm not mistaken.

8 Q. Okay. What kind of surgeon?

9 A. Upper extremity.

10 Q. Okay. And do you recall when it was that you presented to
11 Dr. Beasley?

12 A. Sometime in April.

13 Q. Okay, April of '93?

14 A. Yes.

15 Q. Okay.

16 MR. DINHOFER: At this time, your Honor, I'd like to
17 offer in evidence the records of Dr. Beasley. I believe it's
18 two pages?

19 THE COURT: Any objection?

20 MR. HEUBEL: Let me just see them, Judge. Can we
21 approach, Judge.

22 THE COURT: Yes.

23 (Continued on next page)

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1CDZGIL2

Giladi - direct

1 (At the side bar)

2 MR. HEUBEL: I do have an objection to the admission
3 of these documents, just copies of could have been subpoenaed.
4 Apparently they weren't subpoenaed.

5 THE COURT: They were?

6 MR. HEUBEL: Not subpoenaed, as far as I know.

7 THE COURT: Were they produced to you, to defendants?

8 MR. HEUBEL: Yeah. We've had them during discovery.

9 THE COURT: So what's the nature of the objection?

10 MR. HEUBEL: Objection is they're not authenticated.

11 MR. DINHOFER: They're no different than any of the
12 other records, none of them authentication that we've taken so
13 far, we've been doing it by stipulation.

14 MR. HEUBEL: Right.

15 THE COURT: And why didn't you stipulate to this?

16 MR. HEUBEL: Because I don't want to stipulate to it.

17 MR. DINHOFER: Because it's good for me, obviously.

18 MR. HEUBEL: I don't know that's terribly, but --

19 MR. DINHOFER: Well, never give the other guy what he
20 wants I guess.

21 THE COURT: Well, is it, is there a question about the
22 authentication?

23 MR. HEUBEL: I don't know. How would we know?

24 MR. DINHOFER: The interesting thing, Judge, is this
25 Dr. Beasley is the partner of Dr. Grad, their former expert,

1CDZGIL2

Giladi - direct

1 and I don't think there would be any authentication issue,
2 because that would be challenging their own expert on that
3 basis.

4 MR. HEUBEL: That's absurd.

5 MR. DINHOFER: There is no authentication here. It
6 was one page of notes that he did an examination, and he
7 referred him to, according to his letter, back to Benise
8 Lester. He thought the case was too complicated.

9 MR. HEUBEL: Maybe there are other pages.

10 MR. DINHOFER: It's really not a complex record, I
11 don't plan on spending too much time with it.

12 MR. HEUBEL: The amount of time is irrelevant. It's
13 not a certified copy.

14 MR. DINHOFER: There's never been a challenge to the
15 authenticity in any of the pretrial orders.

16 MR. HEUBEL: We didn't agree to the authenticity of
17 any documents in the pretrial order.

18 MR. DINHOFER: Challenge --

19 THE COURT: Well, without authentication, I'm afraid I
20 can't admit it.

21 MR. DINHOFER: Thank you.

22 (Continued on next page)

1CDZGIL2

Giladi - direct

1 (In open court)

2 Q. When you saw Dr. Beasley, can you tell us what he did for
3 you?

4 A. Like with the other doctors, he took a history and he did a
5 physical examinations.

6 During the physical examinations, after almost the end
7 of physical examination, he was -- for some reason he stopped
8 and went to call one of his colleague, his partners, to consult
9 with him about my condition.

10 Q. Were you seen by this colleague?

11 MR. HEUBEL: Objection, Judge. May we approach?

12 THE COURT: Yes.

13 (Continued on next page)

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1CDZGIL2

Giladi - direct

1 (At the side bar)

2 MR. HEUBEL: Judge, I have -- my objection is based
3 upon discussion with prior counsel where he told me that --
4 this is during the course of this trial -- that what I
5 anticipate him saying is that Dr. Grad, who was the defense
6 prior expert, now unavailable, was the person who walked into
7 the room while they were there. And I see no relevance to
8 that, and extreme prejudice in that.

9 MR. DINHOFER: It's a fact of what occurred, and he's
10 entitled to say the facts of what occurred. The fact that that
11 fact may prove embarrassing to you in some way is not an
12 objection.

13 THE COURT: Was Dr. Grad part of the examination?

14 MR. DINHOFER: Yes.

15 THE COURT: And treatment?

16 MR. DINHOFER: Yes. He's going to say just that, Dr.
17 Grad --

18 THE COURT: We did have reading testimony from Dr.
19 Grad.

20 MR. HEUBEL: This is what he's going to say. He
21 didn't know who he was in the room with him, but apparently at
22 Dr. Grad's deposition he was there and he said, now I recognize
23 the guy who came in. And what is the relevance of Dr. Grad
24 walking into the room, except Dr. Grad is unavailable to
25 respond or for me to have him respond to anything that's said?

1CDZGIL2

Giladi - direct

1 MR. DINHOFER: That's just a fact that would have
2 occurred no matter what, and that's a fact of what occurred.
3 And he's just describing the facts of what occurred. Dr.
4 Beasley called another doctor into for consultation, and he's
5 going to testify to what happened.

6 MR. HEUBEL: Yeah, what's he going to say?

7 MR. DINHOFER: You'll hear it when he says it.

8 THE COURT: Is he going to talk about Dr. Grad?

9 MR. DINHOFER: He's not going to say anything that Dr.
10 Grad said to him or anything. He's just going to say that this
11 man came in, he examined, they consulted, and he subsequently
12 learned at the deposition, he saw him, he put it together.
13 Just as he said. Because this is not a surprise. He testified
14 to this at his deposition, that he tied it together, that this
15 was the same Dr. Grad who examined him years later, and that's
16 it, and that's as far as it goes.

17 MR. HEUBEL: Well, Dr. Grad didn't examine him till
18 years later -- Dr. Grad was an expert.

19 MR. DINHOFER: At the deposition, I'm sorry, saw him
20 at the deposition. I'm sorry, you're correct, he learned about
21 him years later is what I meant to say.

22 MR. HEUBEL: There's nothing relevant probative in
23 that exchange, but it does cast a cloud that I cannot dispel,
24 because I don't have that witness, he's not unavailable because
25 of anything that the defense did.

1CDZGIL2

Giladi - direct

1 THE COURT: We don't know why he's unavailable.

2 MR. DINHOFFER: But it's a fact of what occurred. He's
3 entitled to --

4 MR. HEUBEL: It adds nothing except prejudice.

5 MR. DINHOFFER: No, it's a fact that there was a
6 consultation and who it was who did that consultation at that
7 time, and that's all its stands for.

8 THE COURT: I don't think it's so prejudicial that it
9 substantially outweighs any affect. We did have reading, read
10 testimony from Dr. Grad, so I am going to overrule the
11 objection.

12 MR. DINHOFFER: Thank you, your Honor.

13 (Continued on next page)

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1CDZGIL2

Giladi - direct

1 (In open court)

2 Q. So you told us that Dr. Beasley consulted with someone
3 else?

4 A. Yes, I believe.

5 Q. Did that person come into the examination room?

6 A. Yes, he did.

7 Q. And did that person conduct an examination of you?

8 A. Yes.

9 Q. At the time when you saw that person, did you know who that
10 person was?

11 A. No.

12 Q. Did there come a time when you later learned who that
13 person was?

14 A. Yes.

15 Q. Okay. When was it that you learned who this person was?

16 A. When he underwent depositions, you did a deposition of him.

17 Q. Who was the person?

18 A. Dr. Grad.

19 Q. Can you tell us about the physical examination that Dr.
20 Beasley performed?

21 A. He did strength by equipment, if I'm not mistaken.

22 Q. When you say "strength by equipment," do you mean he used
23 the dynamometer?

24 A. Yes, he use it, and then his partner repeat it again.

25 Q. Dr. Grad also used the dynamometer?

1CDZGIL2

Giladi - direct

1 A. I believe both of them did it, confirm it.

2 Q. Okay. What else did their physical exam consist of?

3 A. They did also, I think he did some sensation test and.

4 Q. Did he use any equipment for the sensation test?

5 A. Think he used needles.

6 Q. Needles, okay. Did he actually pierce your skin with the
7 needles?

8 A. He went and he, he put needles, told me when I -- to tell
9 him -- to close my eyes and to tell me when I feel it, when I
10 don't feel it, something like that.

11 Q. It wasn't breaking skin with them, he was just using it for
12 sensory testing?

13 A. That's correct.

14 Q. Okay. Anything else that he did?

15 A. This is the major thing that I recall.

16 Q. Okay.

17 A. He did a full examination of the hand.

18 Q. Did you bring any EMG's with you to Dr. Beasley?

19 A. I may -- I believe so I did, but I can not testify to that
20 at the moment.

21 Q. Okay. Did Dr. Beasley treat you?

22 A. No. He refer me to, refer me to different doctor.

23 Q. Okay, what doctor was that?

24 A. Doctor Lipsker, somebody at the New York, New York near my
25 office.

1CDZGIL2

Giladi - direct

1 Q. Would the name Benise Lester refresh your recollection?

2 A. Yes, yes.

3 Q. Is that who Dr. Beasley referred you to?

4 A. Yes.

5 Q. Okay. Now, I think you said next in line in May of '93 you
6 returned to Dr. Goodrich?

7 A. No. I believe -- I'm not sure, but I think when I was in
8 Israel in the April for short period of time, I saw -- she's a
9 friend of mine, but she's also hand surgeon, upper extremity
10 surgeon, she's a head of the upper extremity department at
11 Kaplan.

12 Q. Okay. Let's go back one second, though, before we get
13 there.

14 Did you see Dr. Goodrich in August of '92?

15 A. August of 1992? I do not recall.

16 Q. Okay. If I show you the following letter from Dr.
17 Goodrich, part of exhibit 12, dated August 10th of 1992 by Dr.
18 Goodrich, would that refresh your recollection as to whether or
19 not you saw him back then?

20 A. I could saw him, I could give -- I called him to tell him I
21 need something to confirm for what I need, something like that.

22 Q. This might have been a note without a visit?

23 A. I cannot, I cannot testify to that. I don't have any
24 recollection at the moment.

25 Q. Okay. Well, how about this note of May of '93, does that

1CDZGIL2

Giladi - direct

1 refresh your recollection that you saw him in May of '93?

2 A. It's clear from the note that he saw me on May 11, 1993.

3 Q. Okay. And where Dr. Goodrich says in -- and this is again
4 part of exhibit 12, your Honor -- he continues to have
5 progressive loss of neurological function following the ulnar
6 nerve involved motor and sensory distribution, did Dr. Goodrich
7 communicate that information to you?

8 A. Yes.

9 Q. Okay. And did you complain to him about pain in the nerve
10 upon being touched in the elbow?

11 A. I complained to him the same complaint I had with him the
12 first visit, about sharp pain in my elbow, unable to be around
13 people. Because if anybody would touch my elbow, I will jump,
14 and have a lot of discomfort, difficulty on my job, my ability,
15 my inability to perform my job I used to before my surgery, and
16 the concern was that I'm, that I'm deteriorating slowly.

17 Q. Okay. Where it says, that considering his EMG findings,
18 which have shown a loss of conduction velocity and amplitude,
19 along with clinical findings which show a progression and
20 neurological deterioration, did Dr. Goodrich communicate that
21 information to you?

22 A. Yes.

23 Q. Which EMG's was he referring to?

24 A. Dr. Sadeh, if I'm not mistaken.

25 Q. Dr. Sadeh?

1CDZGIL2

Giladi - direct

1 MR. HEUBEL: Objection.

2 THE COURT: Sustained.

3 Q. Did you present any EMG's to Dr. Goodrich for review?

4 A. Yes.

5 Q. Which EMGs did you present to Dr. Goodrich for review?

6 A. Dr. Sadeh.

7 Q. Okay, the one of December '92?

8 A. Yes.

9 Q. Where Dr. Goodrich says that he very definitely needs an
10 ulnar nerve exploration to rule out whether or not this is an
11 injury to the nerve or whether or not he has developed some
12 type of scar or neuroma, did Dr. Goodrich convey this
13 information to you?

14 A. Yes.

15 Q. And where it says, all of these should be done in the very
16 near future, did he convey that to you?

17 A. Yes. He told me that I should do it as soon as possible.
18 But when I asked him about the result of the surgery if should
19 be, if I will have any relief or it will be the way used to be
20 before the surgery the possibility was very -- was not, was no
21 guarantee that I will be the way, because it was too long, too
22 long before, after the surgery.

23 MR. HEUBEL: Objection.

24 THE COURT: Is it a hearsay objection?

25 MR. HEUBEL: Yeah, what Dr. Goodrich said to him.

1CDZGIL2

Giladi - direct

1 THE COURT: Sustained.

2 MR. HEUBEL: And I ask be stricken.

3 THE COURT: Yeah, the witness should disregard
4 statements by Dr. Goodrich as reported by the witness.

5 Q. Okay. In May of '93, did you have occasion to go back to
6 Israel?

7 A. Yes, I did.

8 Q. And when you were in Israel in May of '93, did you consult
9 with any doctors?

10 A. Dr. Rousso.

11 Q. And who is Dr. Rousso?

12 A. Dr. Rousso.

13 Q. Not that we haven't seen him already, but I'm asking you
14 for your knowledge?

15 A. Dr. Rousso is a well known doctor in Israel, he's a plastic
16 surgeon. He's a reconstruction and upper extremity physician
17 who held a lot of academic positions in Israel, and he's very
18 acceptable in the medical, in the medical community in Israel.

19 Q. And did you consult with Dr. Rousso in May of '93?

20 A. Yes.

21 Q. Can you tell me what occurred on the occasion of your first
22 visit with Dr. Rousso in May of '93?

23 A. The procedure between Israel to United States, he did not
24 have forms that I need to list everything I had prior to my
25 visit with him, or what is my complaint or other stuff when you

1CDZGIL2

Giladi - direct

1 walked into the room. He just ask me questions, he take notes.
2 And when I went to the room, he asked me what he can do for me,
3 why I'm here.

4 Q. Okay. When you saw Dr. Rousso in May of '93, did you give
5 him a history?

6 A. I told him why he asked me why I'm here, and I told him I'm
7 here for my elbow.

8 Q. Did you tell him about the history of surgery that you had
9 to your left arm?

10 A. I may did, I may didn't.

11 The issue was not relevant at the time. We were more
12 concerned about what happened in the elbow and why I have pain
13 in my elbow, and what is the cause for the pain of my elbow,
14 when the pain started, if ever I had any injury to my elbow.
15 He went back to since I was a kid, if I ever had crush, if I
16 had any problem with my elbow. He's concerned because I came
17 to him for my elbow and he want to make sure that I'm giving
18 him everything and whatever happened to me to my elbow.

19 Q. Just so I'm clear for a second, from the 1987 surgery that
20 you had on the sensory branch of the median nerve at the
21 wrist --

22 A. Yes.

23 Q. -- is there a scar on your wrist from that surgery?

24 A. It's big scar, big scar in the area.

25 Q. Is that a different scar from the scars from the surgery

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Giladi - direct

1 that you had on your wrist for the surgery that was performed
2 by Dr. Strauch and Sterman?

3 A. Totally different location.

4 Q. Okay.

5 A. I believe.

6 Q. So you were complaining to Dr. Rousso about your elbow?

7 A. That's correct.

8 Q. And can you tell us what occurred?

9 A. I told Dr. Rousso that I underwent surgery on
10 December 12th, 1991 by Dr. Strauch. I explained to him that
11 prior to surgery I never complained about any problem with my
12 elbow, that I never had any injury to my elbow, and my elbow
13 was a virgin area for any disease, except to the entrapment or
14 any crush or any injury.

15 Q. Okay. Did you present with complaints of pain?

16 A. Yes, this what I'm going to next.

17 Q. Okay.

18 A. And I told him that upon waking from surgery, I had a sharp
19 pain at the area of the elbow, at the -- near the bones there.

20 Q. He's indicating the back side of his left elbow.

21 A. Yes.

22 And since this moment from waking up from surgery, I
23 am, I'm having difficulty function with my hands, I have pain,
24 I have sensations. And I also explain to him that I had an
25 ulnar transposition, that's the information I received from my

1CDZGIL2

Giladi - direct

1 physician, my surgeon, and I would like him to evaluate me and
2 tell me if he can help me to let me know what is the cause for
3 the pain.

4 Q. Did Dr. Rousso perform an examination on the occasion of
5 the first visit?

6 A. Yes, he did.

7 Q. And can you tell us what his examination consisted of?

8 A. If I'm not mistaken, he did -- I don't know the first time
9 or the second time he did strength, he did sensation and
10 confirmation of the location of the nerve.

11 Q. Okay. Did Dr. Rousso touch you?

12 A. Yes, he touch me.

13 Q. Where did he touch you?

14 A. At the elbow.

15 Q. Did you return to Dr. Rousso after the first visit?

16 A. Yes, because he told me that my story doesn't make sense.
17 He said to me -- that's all right. And I had to confirm to him
18 that the transposition was being made, so I had to go back home
19 to bring the surgical report to him.

20 Q. And did you provide Dr. Rousso with your surgical report
21 from Montefiore Medical Center?

22 A. I provide him with, if I'm not mistaken, I provided him
23 with two EMG's and surgical report.

24 Q. Okay. And the surgical report would be the same one that
25 we have here in Exhibit one, the three pages of the operative

1CDZGIL2

Giladi - direct

1 report?

2 A. Yeah, one, one preop and one postop.

3 Q. No, no, the surgical report itself, not the EMG's.

4 A. Yeah, the one from --

5 Q. The one from the Montefiore Medical Center that's in
6 evidence?

7 A. Yes.

8 Q. Okay. And then you brought him a preop EMG. Would that
9 have been Dr. Berger's EMG?

10 A. Yes.

11 Q. And you brought him a postop EMG, would that have been Dr.
12 Sadeh's EMG?

13 A. Yes.

14 Q. Did you treat with Dr. Rouso at that point in time?

15 A. I went to him for --

16 MR. HEUBEL: Objection to the form, Judge.

17 MR. DINHOFER: Treatment at that time.

18 THE COURT: Is it just clarification?

19 MR. HEUBEL: Yeah, I'm not sure what that means.

20 THE COURT: Yeah, if you could rephrase it to make it
21 exactly clearer what the question is.

22 Q. Okay. Did Dr. Rouso give you any specific treatment at
23 that time?

24 A. Besides the examination, evaluation and the diagnosis
25 potential what he think is the problem and what I should do,

1CDZGIL2

Giladi - direct

1 nothing.

2 Q. Did he provide you with a written report at that time?

3 A. Yes.

4 Q. What did you do with that written report?

5 A. I believe I fax, I fax it to you.

6 Q. Faxed it to me. Had you spoken to me prior to seeing Dr.
7 Rousso?

8 A. I believe after Dr. Spinner, I realized that I need to
9 consult with some, somebody about my right, and this how I came
10 to you.

11 MR. HEUBEL: I'm sorry, I didn't hear the last part of
12 that.

13 A. I came, I was --

14 MR. HEUBEL: Could you read it back, please?

15 THE COURT: I believe Dr. Spinner, I realize that I
16 need to consult with somebody about my right, and this how I
17 came to you.

18 Q. And did I request that you obtain a report from Dr. Rousso?

19 A. You told me that in order for you to know if anything wrong
20 happened to me, I need to provide you with a written
21 documentation that something like that happened to me.

22 Q. For legal requirements, did I explain to you for legal
23 requirements for the purposes of commencing a medical
24 malpractice report, or lawsuit, the law of the State of New
25 York required that you have a report from a physician attesting

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Giladi - direct

1 to the fact that there was some kind of malpractice?

2 A. Yes.

3 Q. And is that the purpose why you went to Dr. Rousso at that
4 time, to get that report?

5 A. As I said before, it was combination of two. I was looking
6 for somebody who was willing to treat me, because up to that
7 moment the two doctors I saw, Dr. Spinner and Dr. Beasley, was
8 not going to. And based on my assumption from my condition, I
9 cannot go to any doctors to take care of the problem, I need to
10 go to somebody who very expert in the field, and this what I
11 was doing. And Dr. Rousso is internationally known as an upper
12 extremity surgeon, and I thought he's one the people who may be
13 able to help me to my condition.

14 Q. Now, after you saw Dr. Rousso, did you return back to the
15 United States?

16 A. Yes, I did.

17 Q. Okay. And did you return back to work in May of '93?

18 A. Yes, I did.

19 Q. And did something occur at work in June of '93?

20 A. Yes. I was June 30th, 1993, I was being -- my job at that
21 day was to videotape something. For that purpose, I had to
22 rent a camera, professional camera.

23 Q. You had to rent the camera, is that what you said?

24 A. Yes.

25 Q. Okay, continue.

1CDZGIL2

Giladi - direct

1 A. And to bring the camera to the office, I got help from a
2 colleague at work.

3 When I was going to return the camera, for some reason
4 my boss did not want to give me help. And he told me, this my
5 responsibility and I should be able to handle the job on my
6 own.

7 I explained that my medical condition is not so that I
8 can do it by myself. And he informed me that he cannot provide
9 me with any help, because other people busy at the moment and
10 they have their own job and I should do my job.

11 Q. And did you try and do the job?

12 A. Yes, I did.

13 Q. Is that something that we can say that you do to this day,
14 you try and do things with your left arm?

15 A. I, since the moment I returned to work, even though my
16 condition was not permit me to work with my hand the way I used
17 to, I really pushed myself very hard, to act like I don't have
18 any problem. It's even up to today I'm trying to use my hand
19 to do a lot of things that it's hard for me to do. I'm trying
20 not to feel disabled. I'm trying to feel like everybody. I'm
21 trying to feel like I felt before the surgery. It's hard.

22 Q. Okay. So what occurred at work back on June 30th of '93?

23 A. I put the camera in a protecting box, which has wheels on
24 the bottom. I rolled the box from my office to the loading
25 dock at the place where I work. I opened the trunk and I tried

1CDZGIL2

Giladi - direct

1 to put the camera into the trunk. While I'm struggling to put
2 the camera, the box into the trunk, I felt like the hood of the
3 trunk touched my elbow, give me electric shock to my hand. I
4 got like shock. I jumped, and this one point I was trying to
5 protect the box from falling, I tried to balance, and with all
6 that, I hurt my back.

7 Q. And did you make a -- did you later come to make a workers
8 compensation claim with regard to your back?

9 A. Not immediately.

10 Q. Well, later you did?

11 A. When I stopped working, and I realize that I'm not going to
12 be able to get any income from my work, I was being told that
13 the only way I can be compensated is by filing a claim through
14 workmen comp.

15 Q. And at the time when you made that workers compensation
16 claim for your back, did you also make workers compensation
17 claims for the carpal tunnel pain that you were having in your
18 hands?

19 A. No, I did -- I filed -- I filed one by myself. And in this
20 form I put regular that I hurt my back, and I hurt my hand.
21 And for me, hands -- and also if you heard Dr. Roussio yesterday
22 was talking about when he said from the elbow to the hands in
23 Israel, I did not know, but in Israel we talk hands this
24 section of the hand, we don't -- we don't say from here to
25 here -- from shoulder to fingers hand. We, we divide the hand

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Giladi - direct

1 to like six or seven parts. We have the hand, the wrist, the
2 front hands, elbow, upper arm, and shoulder.

3 Q. Okay. Now, did you ever see the Dr. Benise Lester that you
4 were referred to by Dr. Beasley?

5 A. Yes, I saw her in August after my injury, my back injury.

6 (Continued on next page)

1CDFGIL3

Giladi - direct

1 Q. Do you recall when it is that you saw Benise Lester?

2 A. Sometime in August of '93.

3 Q. And just so we're clear, Benise Lester, is that a man or a
4 woman?

5 A. She's a female.

6 Q. Female, okay. And can you tell us what occurred with
7 regard to the visit with Benise Lester?

8 A. Gave her the history, she did examination, and I got pain
9 medication, I believe, from her. And she did some diagnosis.

10 Q. Did you continue to treat with Dr. Lester?

11 A. No.

12 Q. Is there a reason you didn't treat with Dr. Lester?

13 A. Because the direction she's going, she's going in the
14 direction of RSD which I did not have, I had no symptom of RSD.

15 Q. What is RSD?

16 A. Reflex sympathetic syndrome.

17 Q. By the way, had any doctor ever prescribed any appliances
18 for you to wear on your arm?

19 A. I had two doctors, one in '92, Spinner, and when this was
20 damaged, Dr. Goodrich provide me with another one.

21 Q. Did you bring that appliance here with you today?

22 A. Yes, I did.

23 MR. DINHOFER: I believe we're up to Exhibit 16 on
24 plaintiff's part.

25 Q. I'll show you what's been marked for identification as

1CDFGIL3

Giladi - direct

1 Plaintiff's Exhibit 16. Can you tell us what that is?

2 A. This is what's called a Cook splint that I had to wear.

3 Q. And who gave you the splint?

4 A. As I said, the first one was given to me if I'm not
5 mistaken, by Dr. Spinner and the second one by Dr. Goodrich.

6 Q. Did you wear this splint during the course of your
7 rehabilitation that you underwent after the surgery in December
8 of 1991?

9 A. This one I used when I was going around people or when I
10 was asleep.

11 MR. DINHOFER: I offer this in evidence, your Honor.

12 THE COURT: Counsel?

13 MR. HEUBEL: No objection.

14 THE COURT: It's admitted. Plaintiff's Exhibit 16 is
15 admitted.

16 (Plaintiff's Exhibit 16 received in evidence)

17 Q. Were there any other types of appliances, splints or
18 braces --

19 A. Yes.

20 Q. -- and such that you were prescribed to you by the various
21 doctors that you had seen?

22 A. Yes. I had one that was foam from Dr. Rousso. This one
23 was for a daily basis.

24 Q. Okay, that comes later on. Up to this point I'm talking
25 about.

1CDFGIL3

Giladi - direct

1 A. No, it was in May. Dr. Rousso was in May '93.

2 Q. In May he told you to wear a foam splint?

3 A. I believe so.

4 Q. Do you have that splint?

5 A. No, this one is -- deteriorate from sweating and all this
6 stuff and every time I had to get a new one.

7 Q. How many different foam braces did you have to use due to
8 deterioration from sweat?

9 A. I couldn't count, but it was many.

10 Q. It was several?

11 A. Yes.

12 Q. And what portion of your arm did these foam braces cover?

13 A. I had for the injury to my elbow, I did, at the area of the
14 elbow. For the carpal tunnel I had in my wrist one hand wrist.

15 Q. The brace that you used for your wrist for carpal tunnel
16 were those preformed Ace bandage type splints?

17 A. No. This was you buy from the pharmacy, you have a metal
18 bar in the middle, under, on the lower part.

19 Q. On the side of the palm?

20 A. On the side of the palm, to have your hand in a position,
21 one position, and then the rest is the material.

22 Q. Is that what was called a cockup splint?

23 A. Could be.

24 Q. And that was for the carpal tunnel?

25 A. It's correct.

1CDFGIL3

Giladi - direct

1 Q. Did there come a time when you planned on having surgery
2 with Dr. Goodrich?

3 A. Yes, was in I think in October we spoke about surgery, with
4 Dr. Goodrich about surgery.

5 Q. And if I show you Dr. Goodrich's report from Exhibit 12 in
6 evidence of October 26, 1993, does that refresh your
7 recollection as to when you spoke with Dr. Goodrich more or
8 less about surgery?

9 A. Look like the end of October.

10 Q. And did you have a plan to undergo surgery with
11 Dr. Goodrich?

12 A. At the time, yes.

13 Q. And for what purpose were you planning on having that
14 surgery?

15 A. I want to have relief from the pain.

16 Q. Did you in fact have surgery with Dr. Goodrich?

17 A. I couldn't.

18 Q. Is there a reason why you couldn't?

19 MR. HEUBEL: Objection. To the extent it calls for
20 something Dr. Goodrich told him.

21 THE COURT: You may answer if it's not reflecting what
22 Dr. Goodrich told you.

23 Q. Can you tell us the reason why you didn't have surgery with
24 Dr. Goodrich?

25 A. If I did have surgery with Dr. Goodrich, I have to pay for

1CDFGIL3

Giladi - direct

1 the surgery from my own pocket.

2 Q. Why is that?

3 A. Because I was considered, my employment was ended on
4 August 12, I believe in this area and I find out by
5 mid-September I lost my medical benefits.

6 Q. Do I understand you to say that after you hurt your back in
7 June 30th of 1993 you never returned to work?

8 A. No, I worked between June 30th, 1993, the next day and
9 July 1 I saw the doctors. I was in and out. I was really
10 attempting to continue with my work. On August 12 the doctor
11 put me on total disability, so I had to stop working.

12 Q. That was because of your back?

13 A. Because of my back and also I had swelling in my hand here.

14 Q. Is that related to your --

15 MR. HEUBEL: I'm sorry, Judge, is that referring to
16 the right hand?

17 Q. You were indicating your right hand, correct?

18 A. Indicating right hands and also -- I had right hand and
19 swelling on both hands because when I tried to protect
20 equipment it hurt both my hands.

21 Q. But the primary reason you were out is because of your
22 back?

23 A. My back, yes.

24 Q. You understand in this lawsuit we're not claiming that you
25 were out of work on account of your left upper extremity,

1CDFGIL3

Giladi - direct

1 correct?

2 A. My understanding that this lawsuit regarding my left hand,
3 nothing else.

4 MR. DINHOFER: One second, your Honor.

5 THE COURT: Counsel, would this be a good time to take
6 a brief break? I have to do another matter very briefly for
7 five or ten minutes. So we'll take one more break before our
8 lunch break. Please leave your pads on your chairs and we'll
9 meet back in ten minutes.

10 (Jury excused)

11 (Continued next page)

1CDFGIL3

Giladi - direct

1 (In open court; jury not present)

2 (At 11:55 a note was received from the jury)

3 THE COURT: We have a note from the jury. The prior
4 note that I read at 9:45 this morning was Court Exhibit 5, just
5 to be clear. It's a court exhibit as distinguished from a
6 defendant's or plaintiff's exhibit. This new note, Court
7 Exhibit 6 in evidence is dated today, 12/13/11 at 11:55 a.m.
8 "Your Honor, we would like to request respectfully that we
9 optimize the use of the jury by minimizing the length of the
10 breaks. Ideally we would like to submit that any business not
11 requiring the presence of the jury be conducted outside the
12 jury's hours so we could maximize the time spent concluding the
13 evidence. Thank you, Victoria Chin, foreperson of the jury."

14 Okay?

15 MR. DINHOFER: Dig we must.

16 THE COURT: Excuse me?

17 MR. DINHOFER: We'll plow on. If they want us to go
18 without breaks, we'll go without breaks.

19 THE COURT: So maybe we'll take a shorter lunch break.

20 MR. DINHOFER: I don't think that's what they're
21 saying. They're saying when we're working -- I don't think
22 they understand why you took the break that you just took.

23 MR. HEUBEL: Judge, if I may, there are going to be
24 certain things that the litigants and the Court are going to
25 have to do during business hours, and I think your Honor

1CDFGIL3

Giladi - direct

1 should, you know, as you usually do in a nice way let them know
2 that.

3 THE COURT: Yes, that's a fair point.

4 MR. HEUBEL: As a matter of fact, today there's going
5 to be some argument and some applications at the close of
6 plaintiff's case, presumably. That may well take up some time.

7 THE COURT: Right. I mean, to the extent we can do
8 things like an application, arguments about jury instructions,
9 etc., I would like to make those in the morning before they
10 come or in the afternoon after they leave to the extent
11 possible. Sometimes it's possible, sometimes it's not, but
12 it's a fair point and I'll answer their question to the extent
13 I can with that in mind. Okay? Shall we bring them back?

14 (Continued on next page)
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1CDFGIL3

Giladi - direct

1 (In open court; jury present)

2 THE COURT: Members of the jury, thank you for your
3 patience again. I do have your note. Thank you for your note,
4 and I've shared it with counsel. We will do our best to be as
5 efficient as we can with your time. We do try to do that.
6 There are times, for example, this last break was something on
7 a totally different case that I had to deal with, so sometimes
8 it's possible, sometimes it's not. So sometimes it's my fault.
9 Other times there are legal issues that come up in the middle
10 of testimony or something where we do have to do a sidebar.
11 But bearing that in mind we will try to move as quickly as we
12 can and being as efficient as we can with your time by
13 minimizing your breaks. We could try to do a 45-minute lunch
14 break if that helps with moving things along. Does 45 minutes
15 give you enough time? Well, we will try to get as much of the
16 legal issues resolved during things like lunch breaks as we
17 can. The problem is a lot of times you have to leave to go get
18 lunch so coming back it makes it hard. But in any event, I
19 have your note. I will do my best to move things along and I
20 appreciate your continued attention.

21 Mr. Dinhofer, you may continue.

22 MR. DINHOFER: Thank you, your Honor.

23 BY MR. DINHOFER:

24 Q. After you realized that you couldn't have the surgery with
25 Dr. Goodrich, did there come a time when you returned to

1CDFGIL3

Giladi - direct

1 Israel?

2 A. Yes. I think within two months I was in Israel.

3 Q. Excuse me?

4 A. Within two months or three months I was back in Israel.

5 Q. Okay, by the beginning of --

6 A. January, I believe January.

7 Q. Of '94?

8 A. '94, yes.

9 Q. And for how long did you remain in Israel on that trip?

10 A. Until August.

11 Q. When you went back to Israel, what was your reason for
12 going back to Israel?

13 A. One of the reasons to take care of my elbow.

14 Q. What was the other reasons?

15 A. To be in a place where I can be taken care of because I
16 have no income.

17 Q. So who did you live with when you went back to Israel?

18 A. In the beginning with my mother. Then I was with my
19 brother.

20 Q. And while you were in Israel, did you seek out further
21 consultation with regard to your elbow?

22 A. I, as I said before, I had my back injury and I was out of,
23 from the doctors in the United States, so I was seeing doctors
24 in Israel also for my back. I went to this doctor for my back,
25 my carpal tunnel and my elbow, but the treatment was centered

1CDFGIL3

Giladi - direct

1 only around my back and my carpal tunnel syndromes.

2 Q. Who is this doctor?

3 A. Dr. Herness.

4 Q. I offer in evidence the records of Dr. Herness.

5 MR. HEUBEL: Judge, can we approach one moment?

6 THE COURT: Is this the same as the last one?

7 MR. HEUBEL: And an additional.

8 THE COURT: Okay, you may approach.

9 (Continued on next page)

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Giladi - direct

1 (At the side bar)

2 MR. HEUBEL: Judge, my objection is really that if
3 counsel is going to keep offering things in front of the jury
4 that have never been offered before with a witness who is not,
5 has nothing to do with records other than being his patient and
6 I object to the records and they don't come in, that's
7 inappropriate, and I don't think that's the proper way to do
8 this or to have done it. If he was going to put them in or
9 wanted to put them in, he should have told me that ahead of
10 time. It may be in a pretrial order that's years old, but this
11 is inappropriate to do it this way.

12 THE COURT: Counsel?

13 MR. DINHOFER: This comes as no surprise to
14 Mr. Heubel. I can go back and get my pad with the notes, but
15 if your Honor recalls before the trial we were horse trading
16 exhibits that were going to go into evidence and none of them
17 have any of the authenticity requirements that are required,
18 and Dr. Herness was one of the --

19 MR. HEUBEL: Can you keep your voice down, please?

20 MR. DINHOFER: I'm sorry. Dr. Herness was one of the
21 specific doctors we were discussing in terms of horse trading
22 and counsel knew, in fact, it was defense counsel who wanted
23 Dr. Herness in and he flipped-flopped on me when I said, okay,
24 I'll consent to him coming in, which is the way it actually
25 went down. The same with Dr. Lester.

1CDFGIL3

Giladi - direct

1 These are records that counsel proposed at one time
2 that I was tentative about and when I got back to him and said
3 finally okay I'll consent, he said no I changed my mind.
4 That's his prerogative, but to say that he's surprised that I'm
5 offering them if we discussed this --

6 THE COURT: But if there's no authentication, you're
7 not going to get authentication from this witness.

8 MR. DINHOFER: I don't know if he changed his mind,
9 your Honor. That's another reason why I keep offering them,
10 because he did flip-flop, and I don't know where he stands on
11 them.

12 MR. HEUBEL: The reason he keeps offering them is
13 because he knows what that it looks like I don't want them to
14 come in to the jury.

15 MR. DINHOFER: It's based on what you said and your
16 flops. I don't know whether you wanted to put them in or --

17 MR. HEUBEL: I said I didn't want them in. How much
18 clearer can I be?

19 MR. DINHOFER: You flip-flop every day.

20 THE COURT: This is irrelevant, this back and forth.
21 It is irrelevant, it's not stipulated. This is not going to
22 come in. Unless you know they're going to come in or there's
23 authentication for them please don't present them in this
24 manner. They'll be excluded.

25 (Continued on next page)

1CDFGIL3

Giladi - direct

1 (In open court; jury present)

2 Q. Although you were primarily seeing Dr. Herness for your
3 back, you said, did you have occasion to show Dr. Herness any
4 of the prior EMG's with regard to your left upper extremity?

5 A. I do not recall. But I think he send me to have another
6 EMG report, EMG testing.

7 Q. He sent you for another EMG?

8 A. I believe he send me in February of 1994. To Dr. Spira.

9 MR. DINHOFER: We have Dr. Spira's records, your
10 Honor, in evidence as Exhibit 5.

11 Q. Would the date of February 9, 1994 refresh your
12 recollection?

13 A. Based on this report the examination was on February 3rd,
14 1994.

15 Q. Okay.

16 A. And the report was written on the 9th.

17 Q. Okay. And this repeats again, this report again states Dr.
18 Spira's findings with regard to the EMG he performed on you, is
19 that correct?

20 A. Yes.

21 Q. Who is Dr. Spira?

22 A. Dr. Spira is, I do not know if he's a neurologist. I was
23 being sent by Dr. Herness. Dr. Herness is one of the doctors
24 who work on the appeals for the Workman's Comp in Israel and I
25 think that Dr. Spira is the one who is doing the EMG for all

1CDFGIL3

Giladi - direct

1 the people filing appeal for Workman's Comp in Israel.

2 Q. Where Dr. Spira says with regard to the left ulnar nerve,
3 there was some delays of motor unit conduction activity, the
4 cubital canal with some neurogenic pattern. There is clear
5 damage to the nerve at the cubital canal with delays in
6 stimulation and partial denigration. Did Dr. Spira communicate
7 that information to you?

8 A. This information was being told to me by Dr. Herness.

9 Q. Okay. Based on the findings of Dr. Spira?

10 A. Yes, after receiving the report from him.

11 Q. Okay. Did there come a time when you returned to
12 Dr. Rousso?

13 A. I was seeing Dr. Rousso I think since I came back to
14 Israel. As I said, Dr. Rousso became to be my primary
15 physician for my elbow.

16 Q. Why is that?

17 A. Because he saw me in May, he already have a plan for
18 treatment. Dr. Herness, he was a doctor to deal with my back.
19 I came with my elbow and I told him about my elbow, but he and
20 me got to the agreement that I come to him only for my carpal
21 tunnel syndrome and my back and with my elbow I continue with
22 Dr. Rousso.

23 Q. And did Dr. Rousso come up with a plan of treatment for
24 you?

25 A. Yes. He told me to, we have such a plan for surgery.

1CDFGIL3

Giladi - direct

1 Q. By the way, with all these visits that you had with
2 Dr. Rousso, who paid for them?

3 A. I did.

4 Q. And how much did you pay them?

5 A. For office visit I think around \$85.

6 Q. 85 American?

7 A. Yes.

8 Q. And did you pay him in cash?

9 A. Yes.

10 Q. For the report that he did on the initial occasion, did you
11 pay him for that?

12 A. Yes, I did.

13 Q. How much did you pay him?

14 A. Translated dollar I think around \$500, \$600. I do not
15 know.

16 Q. You paid him in Israeli shekels at that time?

17 A. Yes.

18 Q. Did there come a time when you underwent surgery with
19 Dr. Rousso?

20 A. Yes, on April 11, 1994.

21 Q. Can you tell us how that occurred?

22 A. We come to the point where in the surgery I had to do the
23 surgery because I was trying to find out what the problem is
24 and to know, and to receive some help for the pain, and this is
25 the only thing that I was being told it was, may relieve the

1CDFGIL3

Giladi - direct

1 pain but not guarantee, and I took a chance because I was,
2 already my hand was, I couldn't function anymore, and I want to
3 have help because I was planning to come back to work in August
4 of 1994 and I want to have, to be ready to go back to work.

5 Q. Okay. Did you have anesthesia for the surgery with
6 Dr. Rousso?

7 A. No. It was local.

8 Q. It was a local?

9 A. Yes.

10 Q. So you were awake during the entire surgery?

11 A. I heard every word and I know everything what's going on in
12 the surgery.

13 Q. But you weren't able to feel it?

14 A. The surgery I do not feel, but I know what's going on.

15 Q. How did that make you feel knowing what was going on?

16 A. Depressed. Cheated. Deceived.

17 Q. Why did you feel depressed, cheated and deceived?

18 A. Depressed because I hurt my kids. I caused them a lot of
19 emotional problem and they couldn't understand why their father
20 is not willing to play with them, why their father is becoming
21 to be a different person, couldn't relate to the divorce,
22 couldn't relate to my injury. I had no fault in it, and I was
23 paying the price. My kids was pushing me away.

24 When I came back, I come now, as of today my second
25 child is barely talking to me. He's angry with me as of today.

1CDFGIL3

Giladi - direct

1 It's twenty years later. He doesn't want to understand. This
2 shouldn't happen. If my doctor did what he should do, what
3 Dr. Rousso did, we're not going to be here today. He could fix
4 it when he realized that the nerve is injured. I could maybe
5 be in treatment for more than four weeks because of that, but I
6 will be back normal. This is not the first time that I have
7 nerve injury. I had in '87. When the doctor told me that I
8 have nerve injury and I need to go for surgery, within five
9 days I was on the table having my surgery. As I said on my
10 first time when I was sitting here, I believe in preventive
11 medicine. I do everything to prevent problem, but I cannot
12 prevent something it was being hidden from me, it was being
13 concealed from me. How can I prevent it if it's being
14 concealed from me? And this, the fact that the doctor
15 concealed information from me hurts me, hurts my future, hurts
16 my job, hurt my kid, hurt my life. I'm not, I never going to
17 be the way I was before the surgery and the way I die, the day
18 I die, I will be having pain. Doesn't make a difference what
19 Dr. Rousso did. I will live all my life with pain.

20 Q. Okay. Do you recall how long Dr. Rousso's surgery took?

21 A. More than hour is my recollection.

22 Q. And after the surgery can you tell us what if anything
23 occurred with regard to your left arm?

24 A. I was in the hospital until sometime in the afternoon. In
25 the afternoon I was released and I went home. I came back

1CDFGIL3

Giladi - direct

1 after two days. He did his evaluation. He told me to come
2 back for the day to remove the stitches. After removing the
3 stitches he told me to start physical therapy and I have, I
4 went to a friend of mine that he's a physical therapist and he
5 was working on my hand.

6 Q. You had some physical therapy while you were there in
7 Israel?

8 A. Not officially, but I was being taken care of.

9 Q. By a friend?

10 A. Yes.

11 Q. And what did that therapy consist of that you had with the
12 friend?

13 A. Occupational and physical therapy.

14 Q. What did he have you doing?

15 A. He had a circle with a mesh inside and I had to do some
16 finger movement. He did something for strength to, something
17 like a rubber to the wall and I had to pull it to build
18 strength. I put my hand in a special bath to feel comfort. He
19 did ultrasound. He did whatever necessary for, to improve my
20 hand.

21 Q. And how long did you go for physical therapy in Israel?

22 A. I think until almost until the time -- maybe for a month,
23 something like that.

24 Q. And do you know how many sessions he did during that month?

25 A. No, whenever he had time I went. I went to him, so I

1CDFGIL3

Giladi - direct

1 cannot tell you exactly.

2 Q. Are we talking about something you did once a week, twice a
3 week, something else?

4 A. At least twice a week.

5 Q. At least twice a week?

6 A. Yes.

7 Q. Did you have to pay Dr. Rousso for the surgery?

8 A. Yes, I did.

9 Q. And how much did you pay Dr. Rousso for the surgery?

10 A. \$2,000.

11 Q. Was that U.S.?

12 A. Yes.

13 Q. And did you have to pay the hospital for the surgery?

14 A. Yes, I think around \$500. This is my recollection. I'm
15 not --

16 Q. Postoperatively, did you have to pay Dr. Rousso for any of
17 the office visits?

18 A. I think for the first or second visit I didn't pay or maybe
19 only the first one I did not pay, but the rest I paid of the
20 visit.

21 Q. Do you have any idea of how many office visits you actually
22 paid Dr. Rousso for?

23 A. I believe it's four or five.

24 Q. Do you feel you had any kind of improvements in your left
25 upper arm symptomology as a result of the surgery performed by

1CDFGIL3

Giladi - direct

1 Dr. Rousso?

2 A. I have some relief but not to the extent that I say I can
3 function.

4 Q. Could you just try and detail for us what kind of relief it
5 is that you did have?

6 A. I'm not isolating myself any more from people that I knew
7 before Dr. Rousso's surgery. I still have the pain in my elbow
8 when somebody touch me but not to the extent that was prior to
9 that. I'm more tolerant but still not really tolerant. I
10 don't know if that's really understood, but --

11 As I said before, I am trying very hard to function
12 like everybody would like to be functioning, and I'm trying to
13 ignore it. Before Dr. Rousso surgery, even if I wanted, I
14 couldn't, because the little touch cause me pain for a day or
15 two. Now it's a little bit different, but still is not
16 comfortable.

17 Q. It's been roughly sixteen, seventeen years now since
18 Dr. Rousso's surgery, and during that time have you noticed any
19 kinds of improvement in terms of your strength in the fourth
20 and fifth fingers of your left hand?

21 A. Put it this way, before Dr. Rousso did the surgery I had
22 some clawing of my hand, my hand, my four and fifth finger I
23 had some freeze and I had some problem of clawing or something,
24 I think this is the name he call it, they're calling it.

25 Q. A contracture of the fingers?

1CDFGIL3

Giladi - direct

1 A. Yes. Even Dr. Spira when I showed him the pictures that
2 one of my colleagues took from work, when he saw that, he
3 wanted to take this picture for publication. This one of the
4 major things that really got improved from Dr. Rouso's
5 surgery.

6 Q. Okay. You don't have the clawing as much anymore?

7 A. I have some clawing, if you look, I have -- my fifth finger
8 and fourth finger are constantly touching one another, is not
9 normal, but this is what I have. It's better than what I have
10 before.

11 Q. Okay. How about the sensation in the fourth and fifth
12 fingers? Do you have any improvement there?

13 A. Not really to the extent that I can -- I have improvement,
14 but not major.

15 Q. Did you have any complaints with regard to a loss of
16 sensation in your fourth and fifth fingers when you first saw
17 Dr. Strauch?

18 A. I did not have any complaint regarding to the ulnar nerve
19 distributions.

20 Q. And that includes the elbow as well?

21 A. Elbow, from the shoulder to the fingers, all this I did not
22 have any.

23 Q. And how about at the elbow itself? After he removed the
24 neuroma, was there any improvement at the elbow?

25 A. For the first, for a while I did not have the pain in

1CDFGIL3

Giladi - direct

1 there, but after this I start to have, for some reason I start
2 to have some pain again there which I did not understand it.
3 So he told me that I may developing some little neuromas around
4 a scar of the cut. And I asked him what is that and he told me
5 this is, with some people it's normal. When they already
6 develop the first neuroma, this could happen again. But I did
7 not have the same thing from the first one, so this could be
8 recurrent because my body already develop the first neuroma.

9 Q. Do you still have that problem with the scarring today?

10 A. Yes.

11 Q. Some of this we've touched on. I'm going to do it in the
12 phrasing of the questions I'm going to ask you now. Are there
13 things that you used to do with your left arm that you can't do
14 now as a result of the surgery -- which you attribute to being
15 as a result of the surgery of December 12, 1991 and the injury
16 that you sustained in that surgery?

17 A. Yes. I would start with my son. He's twelve years old
18 now.

19 Q. This is from your second marriage?

20 A. Yes. He wanted to learn martial arts because he know that
21 I used to do martial arts before. He want me to teach him and
22 to work with him and I refuse. I said I cannot do it. He get
23 annoyed, but he get used to it. He got used to it, but he's
24 still annoyed. And he also know that he's not allowed to come
25 from my left side. If he have to do anything with me he have

1CDFGIL3

Giladi - direct

1 to come from the right side, and my two kids, knowing that my
2 left side is absolutely not near you can come or touch.

3 My adult relationship is very difficult, it's not
4 something the way it was before my injury. I would put this
5 way. From the time of the surgery until maybe a year or so
6 after Dr. Rousso I did not have any adult relationship with
7 nobody. I isolated myself totally with people. I was totally
8 isolated from my family, isolated from my nieces and nephew, I
9 isolated myself. When I went overseas I just went to the room
10 and sat down by myself. I try not to be -- I was not social.
11 That's not me. I'm a very social person. I love to be with
12 people. I love to enjoy the company of people. It's been
13 taken away from me.

14 Q. How about activities of daily life, household chores and
15 such not? Are there things that you used to do that you don't
16 do anymore?

17 A. I do my best, as I said before, to function like I don't
18 have a problem. I really work very hard with my kids from my
19 second marriage. When I was trying to take care of them, most
20 of the stuff I used to do is sitting on the floor because I
21 cannot function with my left hand, so if I need to feed them or
22 something like that, I used to sit on the floor, cross my leg,
23 put the baby on the floor and feed him this way instead of
24 holding them or putting -- I had to modify and find a way to
25 operate and not to excuse my hand from being able to do so.

1CDFGIL3

Giladi - direct

1 This is why I was working for a year and a half after my
2 surgery. I was doing my work, I was trying to find a way to do
3 my job, even though my hand do not allow me to do it the way I
4 used to. Got to the point that my boss got upset and closed my
5 department because from being a profit department I began to be
6 a loser because I was not getting as much jobs as I used to,
7 because nobody liked to work with me anymore, because a job
8 took forever. It did have effect on my life.

9 Q. Sitting here now, and I think we covered this, but just
10 quickly, can you tell me what your present complaints are
11 related to the injuries you suffered as a result of the surgery
12 of December 12, 1991?

13 A. Pain in my elbow. Sensitive to touch in the area of the
14 elbow, any touch will create pain. Weakness and loss of
15 sensation.

16 (Continued next page)

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1CDZGIL4

Giladi - direct

1 BY MR. DINHOFER:

2 Q. And is it your understanding that these complaints will
3 continue for the rest of your life?

4 A. As I said before, until the day I die.

5 MR. DINHOFER: Thank you. That concludes my direct
6 examination, your Honor.

7 THE COURT: Okay. Let's take a one minute stretch
8 break. You want to stand up, you can stretch your legs and
9 back. I think then we'll go till 1:00, unless somebody needs a
10 break.

11 Okay, cross-examination, Mr. Heubel.

12 MR. HEUBEL: Judge, I have just one more moment?

13 THE COURT: Sure.

14 CROSS EXAMINATION

15 BY MR. HEUBEL:

16 Q. Good afternoon, Mr. Giladi.

17 A. Good afternoon.

18 Q. You and I have never met, have we?

19 A. No.

20 Q. Never had the occasion during the course of this litigation
21 to meet each other face-to-face prior to this trial, right?

22 A. That's correct.

23 Q. Now, Mr. Giladi, isn't it a fact that you knew, long before
24 you saw Dr. Strauch for the first time, in fact three or four
25 years before you saw Dr. Strauch for the first time, that you

1CDZGIL4

Giladi - cross

1 had ulnar nerve entrapment at your left elbow; isn't that true?

2 A. Yes.

3 Q. I'm sorry?

4 A. Yes.

5 Q. And you knew that, because you had been going to Dr.

6 Kaplan, as you told us earlier, for many years, correct?

7 A. Yes, I do.

8 MR. HEUBEL: And, Judge, may I approach just for a
9 moment?

10 THE COURT: Yes.

11 Q. During the time that you had been going to Dr. Kaplan, Mr.

12 Giladi, you had some EMG's done, correct?

13 A. That's correct.

14 Q. And, as a matter of fact, you had an EMG done in November
15 of 1987; true?

16 A. Yeah, this is after the surgery of '87.

17 Q. That was your wrist surgery, though, right?

18 A. Correct.

19 Q. And Dr. Kaplan told you, did he not, that in November of
20 1987, you had entrapments involving the median nerve at both
21 the wrist and ulnar nerves at both elbows, correct?

22 A. I believe so.

23 Q. And you knew that an entrapment meant that there was some
24 problem with the way the ulnar nerve was positioned at the
25 elbow; true?

1CDZGIL4

Giladi - cross

1 A. No, I did not know that at the time, which I know that
2 issue was not even was not symptom to confirm it. I was
3 working --

4 Q. And you told this jury --

5 MR. DINHOFER: He didn't finish his answer.

6 THE COURT: Are you finished with the answer?

7 THE WITNESS: No, I did not.

8 THE COURT: Okay, you can finish your answer.

9 A. I was working and I did not have a complaint.

10 The fact that entrapment was being found depends on
11 what stage; if it's mild, minor or moderate degree. I did not
12 have moderate degree or mild degree, and Dr. Kaplan at the time
13 did not tell me that my condition is that I have a damaged
14 nerve at the place, saying that I have entrapment and just go
15 ahead with this, go ahead and not tell me that anything else.
16 I follow what he told me. I did not look at this as an issue.

17 Q. Well, you knew, Mr. Giladi, that an entrapment was not a
18 normal finding; true?

19 A. Entrapment --

20 MR. DINHOFER: Objection to the term, your Honor.

21 A. I'm not a doctor.

22 Q. Well, when Dr. Kaplan conveyed to you that you had
23 entrapment of the nerve, in the ulnar nerve in the elbow, you
24 didn't think that was a normal finding, did you?

25 A. If I thought it's normal?

1CDZGIL4

Giladi - cross

1 Q. You didn't think it was normal, did you?

2 A. Entrapment for me mean you have something there. But what
3 it is, I do not know. If I do not know, I do not know what is
4 important of it.

5 Q. Something there -- all I asked you was, you knew that the
6 something that was there was not normal, correct?

7 A. What is normal for you? I do not know.

8 Q. I didn't ask what was normal for me, Mr. Giladi.

9 A. If you ask me what norm --

10 Q. I asked you, I asked you if you knew when you were told by
11 Dr. Kaplan that an entrapment of the ulnar nerve at the elbow
12 was not normal?

13 MR. DINHOFER: Your Honor, this has been asked and
14 answered now four times. I think my client has answered it
15 sufficiently.

16 MR. HEUBEL: I don't think I've gotten an answer,
17 Judge.

18 THE COURT: I'm not sure. If you have an answer or if
19 you --

20 A. I said --

21 THE COURT: -- if you don't understand --

22 A. I did not understand. At the time my English was not as
23 good as today. I was -- entrapment for me that you have
24 something in the elbow, but I did not know the meaning of that
25 today.

1CDZGIL4

Giladi - cross

1 Q. When did your English improve?

2 A. During the years, for the last ten years my English
3 improved dramatically.

4 Q. So you're telling the jury that your English was not so
5 good back at the time when you were seeing Dr. Strauch?

6 A. My English was not good to the point that I have it today.
7 My English was good at the time, but not as good as today.

8 Entrapment --

9 Q. Are you saying that you didn't know what Dr. Strauch and
10 the other doctors were saying to you because your English was
11 not good?

12 A. No, I -- you talking about '87, we're talking about '91.
13 Between '87 to '91 is four years that I learn a little bit more
14 English, and I also got to learn the language better and to
15 understand it better. And I, you -- as I said before,
16 entrapment for me was not a big issue.

17 Q. Mr. Giladi, I didn't ask you if it was a big issue. I
18 asked you, isn't it correct that you knew it wasn't normal; big
19 issue, small issue, whatever, you knew at the time that it
20 wasn't normal, isn't that correct?

21 A. Is not -- put it this way, yes.

22 Q. Thank you. Now, you told us that a little while ago, that
23 you never had, before seeing Dr. Strauch, any symptoms with
24 your left arm from shoulder through the elbow, correct?

25 A. No, that's not what I said.

1CDZGIL4

Giladi - cross

1 Q. Okay.

2 A. I, you like --

3 Q. I'm sorry, I stand corrected. You said what you didn't
4 have --

5 MR. DINHOFER: May the witness finish his answer
6 without interruptions, your Honor?

7 THE COURT: Well --

8 MR. DINHOFER: The witness was still talking, and he's
9 just talking over him, Mr. Heubel, when he's trying to say
10 something. Mr. Giladi is soft spoken and I think he's taking
11 advantage of that moment to speak over him.

12 THE COURT: Well, okay, okay. He said that's not what
13 I said.

14 MR. DINHOFER: He was continuing on.

15 THE WITNESS: Which I said was that I never had a
16 problem on the ulnar nerve distribution of my hand.

17 Q. And, Mr. Giladi, when you say the ulnar nerve distribution,
18 you're talking about the fourth and the fifth finger, is that
19 right, at least including those two digits, is that correct?

20 A. Including everything related to the nerve. I'm talking
21 about the nerve themselves.

22 Q. Correct. You used the term "ulnar nerve distribution."

23 By the way, did you know what the term ulnar nerve
24 distribution meant?

25 A. With the --

1CDZGIL4

Giladi - cross

1 Q. In 1991 and before then?

2 A. No. I know it today.

3 Q. And when you told the jury that you didn't have any
4 symptoms in the ulnar nerve distribution, you were talking
5 about what?

6 A. The ulnar nerve was without any injuries.

7 Q. And you also told this jury earlier that you did not have
8 any problems with the elbow, correct?

9 A. I never had a problem with the elbow until '91.

10 Q. Until '91?

11 A. Meaning -- '91, yeah, December -- December 12th, 1991.

12 Q. And you also told the jury that you didn't have any
13 problems with the ulnar nerve distribution before December of
14 1991?

15 A. When I'm talking about the ulnar nerve distribution, I'm
16 talking about injury to the nerve itself.

17 Q. Doctor, isn't it a fact -- I mean, not Doctor. Mr. Giladi,
18 isn't it a fact, that as early as 1988, you were having
19 symptoms related to your ulnar nerve at the elbow?

20 A. It's not exactly correct.

21 Q. That's not correct?

22 A. It's not exactly correct, because I can explain myself to
23 you.

24 MR. HEUBEL: Judge, can I just step up for a moment?

25 THE COURT: Yes.

1CDZGIL4

Giladi - cross

1 Q. Do you remember earlier today telling us that you went to a
2 Dr. Spinner?

3 A. Yes. After my surgery of '87, I went to Dr. Spinner
4 because I had hematoma at the biceps here, which caused by
5 anesthesia. And as a result, my hand was swelling and too much
6 pressure on ulnar nerve there, and I wanted Dr. Spinner to help
7 me with that and --

8 Q. And you told us you went to Dr. Spinner in February of
9 1988, correct?

10 A. Because the problem that I had.

11 Q. My question was, did you go there in 1988?

12 A. I don't remember. I do not remember the dates. If you say
13 so, I did.

14 Q. Well, let me show you. Do you see this note from Dr.
15 Spinner in evidence?

16 A. Yeah, this first visit with him.

17 Q. As defendant's Exhibit B in evidence, do you see that the
18 date on there?

19 A. I say it look like the first visit with him.

20 Q. February 1st, 2008, correct?

21 A. Yeah. It's after the surgery in September of '87.

22 Q. And didn't you tell Dr. Spinner then that when you flex
23 your elbow, you have numbness in your hand?

24 MR. DINHOFER: Objection. It's a mischaracterization
25 of what's in evidence.

1CDZGIL4

Giladi - cross

1 THE COURT: Okay, could you clarify.

2 MR. HEUBEL: I'm not reading what's in evidence. I'm
3 asking the witness a question.

4 MR. DINHOFER: It's a mischaracterization of what's in
5 evidence. The evidence speaks for itself.

6 THE COURT: Didn't you tell Mr. Spinner that when you
7 flex your elbow, you have numbness in your hand?

8 THE WITNESS: I do not recall. I do not recall.

9 Q. Mr. Giladi, I'd like you to take a look at that note by Dr.
10 Spinner that we talked about a moment ago, and specifically I'd
11 like you to look at the last -- second-to-last sentence in the
12 first paragraph. And you see where it begins, "it should be
13 noted?"

14 A. Where are you talking about?

15 Q. First paragraph 2/1/88, second to the last sentence which
16 begins, it should also be noted?

17 THE DEPUTY CLERK: This is defendant's exhibit B,
18 correct?

19 MR. HEUBEL: Defendant's exhibit B, yes.

20 THE DEPUTY CLERK: Thank you.

21 Q. You see that?

22 A. I see that. And he said very clear, that when I flex my
23 elbow I have, I have numbness in my hand. But he doesn't say
24 which fingers in my hand I have the numbness.

25 Q. Okay. Dr. Spinner, most certainly related the flexing of

1CDZGIL4

Giladi - cross

1 your elbow to the numbness in your hand, did he not?

2 A. But what finger, I do not know what he's talking about.

3 Q. In another -- I'm not asking you about fingers. But you
4 flexed your elbow while you were at Dr. Spinner's office?

5 A. That's correct.

6 Q. And you told him that when you did that, you had more
7 numbness in your hand, correct?

8 A. Based on the notes, he did some examination and I had some
9 numbness. Which fingers is not talking about, he -- it could
10 be, he told to do something like that too.

11 Q. Mr. Giladi, are you a doctor?

12 A. I'm saying I do not --

13 Q. Are you a doctor?

14 A. I'm a paramedics.

15 MR. DINHOFER: Objection, your Honor.

16 THE COURT: The witness -- the objection is overruled
17 and the witness is instructed to answer the question.

18 MR. DINHOFER: I got a different objection. When he's
19 raising his voice, he's starting to run into the witness too.

20 THE COURT: Overruled.

21 A. I'm a paramedics.

22 Q. Mr. Giladi, are you threatened by me?

23 MR. DINHOFER: Objection.

24 THE COURT: That's an argumentative question.

25 MR. HEUBEL: Withdrawn, withdrawn, Judge.

1CDZGIL4

Giladi - cross

1 MR. DINHOFER: That's ridiculous.

2 THE COURT: Sustained.

3 Q. Mr. Giladi, when you were at Dr. Spinner's office,
4 according to this note, you bent your elbow and you told Dr.
5 Spinner that when you did that, you had more numbness in your
6 hand, correct?

7 A. Based on the note, yes.

8 Q. Now, that was approximately three years before you saw Dr.
9 Strauch, true?

10 A. Give or take, yes.

11 Q. And, by the way, Mr. Giladi, you had also asked Dr. Kaplan
12 as you did later with Dr. Strauch, for a letter to use to be
13 excused from military duty back in July of 1988, correct?

14 A. Yeah, because I was having problem with the hematoma, and I
15 was still working on it to fix it to -- I was waiting for the
16 what happened there to reduce. And I have a responsibility to
17 my soldiers and to the country and to myself and to my family,
18 and I needed something that in case I need it, I should use it.

19 Q. And Dr. Kaplan gave you that letter, just like Dr. Strauch
20 did, right?

21 A. That's correct.

22 MR. HEUBEL: And, Judge, this is plaintiff's Exhibit
23 four in evidence.

24 Q. The letter, a letter from Dr. Kaplan dated July 26, 1988;
25 can you see that, Mr. Giladi?

1CDZGIL4

Giladi - cross

1 A. Yes, I see that.

2 Q. And do you see that in that letter -- by the way, Dr.

3 Kaplan gave this letter to you to take to Israel or wherever

4 you needed to go to present that in the event that you were

5 asked to do something with respect to your military duty,

6 right?

7 A. That's correct.

8 Q. And you read that letter at the time he gave it to you,

9 just like you told the jury you read documents given to you by

10 Dr. Strauch, correct?

11 A. Yes.

12 Q. And you see in that letter, Mr. Giladi, that among the

13 things listed by Dr. Kaplan, in about the middle of the letter

14 two-thirds of the way down, it says, "In addition, he has multi

15 focal entrapments of the median ulnar nerves, bilaterally, in

16 the arms occurring at the wrist and elbows respectively?"

17 A. That's correct.

18 Q. Do you see that?

19 A. That's correct.

20 Q. And does Dr. Kaplan go on to say that Mr. Giladi is in no

21 way a candidate for military duty and would probably represent

22 a hazard in any military situation, correct?

23 A. That's correct, because --

24 Q. And was it your understanding, Mr. Giladi, that Dr. Kaplan

25 was telling whoever your superiors might be or whoever you have

1CDZGIL4

Giladi - cross

1 to give this letter to, that these were the reasons why you
2 might be a hazard in any military situation?

3 A. No, it's not why.

4 Q. Now, did he give it to you -- did he give you this letter
5 for some other purpose?

6 A. He gave me this letter because I was having problem with my
7 biceps and the hematoma, and this creating some of the symptoms
8 that I had. And, in his opinion, until this issue was not be
9 resolved, I should not be in the military duties.

10 Q. Now, Mr. Giladi, going back to the notes of Dr. Spinner,
11 the one that we referred to before which was part of
12 defendant's exhibit B, the last sentence in the first
13 paragraph. You see that?

14 A. The last sentence of?

15 Q. Of the first paragraph, after the elbow and the numbness
16 sentence it begins, "It is suggestive of a cubital tunnel
17 syndrome separately; do you see that?

18 A. I see it now.

19 Q. Now, you know from all the experience you've had, up to
20 today, including this trial, that the cubital tunnel is the
21 groove that the ulnar nerve passes through at the elbow, right?

22 A. He's talking about entrapment here.

23 Q. I'm sorry?

24 A. He's talking about the entrapment.

25 Q. Dr. Spinner is saying that when you flex your elbow, you

1CDZGIL4

Giladi - cross

1 get more numbness in the hand, and that is suggestive of
2 cubital tunnel syndrome separately, correct?

3 A. As I said.

4 Q. And what Dr. Spinner -- did Dr. Spinner tell you what his
5 findings were back then in 1988?

6 A. He spoke with Dr. Kaplan at the time.

7 Q. No, I asked you if you -- if Dr. Spinner told you what his
8 findings were at that time?

9 A. Can I answer?

10 Q. My question, sure.

11 A. Thank you. Dr. Kaplan referred me to him. When I was at
12 his office, if I'm not mistaken, he called Dr. Kaplan. Dr.
13 Kaplan maybe told him about my entrapment. And he just -- when
14 he -- I was in his office, he told me besides that, I have the
15 entrapment, and that's it.

16 I never saw this note, this personal note. He never
17 told me this that I have a syndrome the way it where it it.
18 Here he told me --

19 Q. Well, the way it's worded here is that the numbness that
20 you feel when you bent your elbow is suggestive of a cubital
21 tunnel syndrome separately; isn't that correct?

22 A. I do not know.

23 Q. Okay.

24 A. I do not know what, but I don't understand your question.
25 Can you repeat the question, please?

1CDZGIL4

Giladi - cross

1 Q. My question was, these two sentences, Mr. Giladi, it should
2 also be noted that when he flexes his elbow, he gets more
3 numbness in his hand. It is suggestive of a cubital tunnel
4 syndrome separately.

5 You understand that to mean that the numbness you felt
6 on bending your elbow suggested to Dr. Spinner that you had a
7 problem in your elbow; true?

8 MR. DINHOFER: Objection. At what point in time?
9 Based on the present knowledge he has or at the time back when
10 he saw him with --

11 Q. Well, start right now.

12 MR. DINHOFER: If this information was even conveyed
13 to him, which I think he said it wasn't at the time.

14 THE COURT: I think it's a fair question.

15 You understand, present tense, do you understand that
16 to mean that the numbness he felt on bending your elbow
17 suggested to Dr. Spinner that you had a problem with your
18 elbow; true.

19 THE WITNESS: My understanding from this statement
20 that Dr. Posner -- Spinner was not sure, is assuming, but you
21 have no evidence that there's some disease going on with the
22 nerve. He said very clear that possibility.

23 Q. Well, Mr. Giladi, you don't -- withdrawn.

24 You have no reason to disbelieve Dr. Spinner when he
25 says that when you flexed your elbow, you had more numbness in

1CDZGIL4

Giladi - cross

1 the hand; you have no reason to disbelieve that, do you?

2 A. I never doubt doctors. If I would doubting doctor, I was
3 going to do things with my elbow beforehand.

4 I never doubt doctors. But doctor told me something
5 that's the first I do what they told me.

6 Second, this note I never saw in my life before,
7 before. This issue, this is internal issue. I do not know. I
8 know what he told me at the time of the examination. The time
9 of the examination he never mentioned anything about. He just
10 took notes and he wrote.

11 Q. Well --

12 A. What he wrote, I have no knowledge. So I cannot tell you
13 what you thinking, what thinking. I know what he told me at
14 the time.

15 Q. If Dr. Spinner note is correct, then while you were at his
16 office in 1988, you bent your elbow and you had more numbness,
17 and you told him that you had more numbness in your hand,
18 correct?

19 MR. DINHOFER: I think we've covered this for the last
20 half-hour, your Honor.

21 THE COURT: I'll allow it.

22 A. As I said before, whatever the doctor writing, I assume it
23 is correct.

24 Q. Now, you also saw Dr. Kaplan in January of 1990, correct?

25 A. Could be.

1CDZGIL4

Giladi - cross

1 Q. I'm sorry?

2 A. Could be.

3 Q. Okay. I'm going to show you a portion of Dr. Kaplan's
4 records, which is in evidence as plaintiff's Exhibit four. Do
5 you see that note as dated 1/9/90?

6 A. Yes.

7 Q. Now, Mr. Giladi, when you went to visit Dr. Kaplan on
8 various occasions, at least sometimes he would ask you for a
9 history of what had been going on with you and what your
10 complaints were; true?

11 A. Not all the time.

12 Q. Well, I didn't say all the time. Some of the occasions
13 when you went to Dr. Kaplan, he would ask you for a history as
14 to what was going on with you with respect to what complaints
15 you had?

16 A. It's a possibility, yes.

17 Q. I'm sorry?

18 A. It is a possibility.

19 Q. Okay. And if Dr. Kaplan noted in his records that you told
20 him that you continued to have pain in your arms, that would be
21 correct, would it not?

22 A. Yes.

23 Q. And if Dr. Kaplan said in his note recorded -- in his note,
24 that you had pain from the left wrist to the elbow to the
25 shoulder, that would be correct as well; true?

1CDZGIL4

Giladi - cross

1 A. Yes.

2 Q. And if Dr. Kaplan said in his note that the pain from your
3 left wrist to the elbow to the shoulder is worse with movement,
4 that would be true as well, correct?

5 A. Yes.

6 Q. And if Dr. Kaplan said that this pain in your left wrist to
7 elbow to shoulder was worse while you were holding a telephone,
8 that would be true too, would it not?

9 A. Yes.

10 Q. And in order to hold a telephone in your left hand, you
11 have to bend your elbow; true?

12 A. True.

13 Q. I'm sorry?

14 A. Yes.

15 Q. Now, Mr. Giladi, I'd like you to take a look at the first
16 paragraph of Dr. Kaplan's note dated 1/9/90. Does that note
17 say that you continue to have pain in your -- in his arms?

18 A. But it don't say where in his arm I have it.

19 Q. I'm sorry?

20 A. It doesn't specify which area of my arm I have pain.

21 Q. It just says arms, correct?

22 A. Arms is which part of the arm; upper arm?

23 Q. All I asked you was, does it say that you continued to have
24 pain in your arm?

25 A. Yes. And he's talking about -- he's talking about biceps,

1CDZGIL4

Giladi - cross

1 because it's the area I was complaining about.

2 Q. Okay. His next sentence says, "He has pain from the left
3 wrist to the elbow to the shoulder," does it not?

4 A. That's correct.

5 Q. Dr. Kaplan doesn't say he has pain in his bicep, does it?

6 A. No.

7 Q. And the bicep, you know the bicep is up here between the
8 elbow and the shoulder; true?

9 A. That's correct.

10 Q. And would you agree with me that Dr. Kaplan probably knew
11 what a bicep is?

12 A. That's correct.

13 Q. At the time?

14 A. That's correct.

15 Q. And do you see in the fourth sentence, "it is worse while
16 holding a telephone," you see that?

17 A. Yes. And I know why. I know what he's talking here is
18 about also --

19 Q. I didn't ask you what he was talking about. I asked you if
20 that's what it says in the note?

21 A. Yes. He's talking about a shoulder, for the shoulder, this
22 is what is believed at the time that I have.

23 Q. Now, you were talking to us a moment ago about the term
24 "ulnar nerve distribution," right?

25 A. That's correct.

1CDZGIL4

Giladi - cross

1 Q. Okay. And I may have asked you this before, but bear with
2 me, I'm going to ask you again. Included in your terminology
3 of the ulnar nerve distribution are these two fingers, the
4 little finger and the finger next to it?

5 A. That's correct.

6 Q. Right? And we refer to that as the fourth and fifth
7 finger?

8 A. That's correct.

9 Q. Okay. Now --

10 THE COURT: Counsel, would this be a good time to
11 break for lunch?

12 MR. HEUBEL: Just one or two more questions.

13 THE COURT: Okay.

14 Q. Mr. Giladi, when you met with Dr. Kaplan on January 9th,
15 1990, that was almost a year before you went to see Dr.
16 Strauch, correct?

17 A. That's correct.

18 Q. And you told Dr. Kaplan at that time that you had
19 occasional numbness of the fingers, especially the fourth
20 finger; didn't you tell him that?

21 A. I do not recall.

22 Q. You don't recall. If Dr. Kaplan put in his notes that he
23 occasionally has numbness of the fingers, especially the fourth
24 finger, that would be correct, wouldn't it?

25 A. You talking about this fingers, this finger, ring finger.

1CDZGIL4

Giladi - cross

1 Q. Didn't we just say fourth and fifth fingers?

2 A. No, ring finger goes both direction.

3 Q. I didn't ask you about direction. I asked you --

4 A. You asked me about ulnar nerve distribution. If we want to
5 be clear and honest to the jury, we have to be honest. Number
6 four goes, half of it go to the ulnar, and the other half go to
7 different nerve, so.

8 Q. So the fourth finger is within the ulnar nerve
9 distribution; true?

10 A. Half of it.

11 Q. Okay. The finger, half the finger is in the ulnar nerve
12 distribution, right?

13 A. I did not specify, but yes.

14 Q. Now, also at that time Dr. Kaplan in his same note of
15 1/9/90, says the following: In the second paragraph?

16 MR. DINHOFER: Is that exhibit in evidence?

17 MR. HEUBEL: I'm sorry, my mistake.

18 Q. Exhibit four --

19 MR. HEUBEL: And this will be my last question, Judge.

20 Q. You see that, the second paragraph, after examination
21 beginning, he has tenderness; there is a sentence, the third
22 line?

23 A. Are you talking about normal strength?

24 Q. No. He appears to have rather significant slowing of
25 median nerve conduction across the left wrist and ulnar nerve

1CDZGIL4

Giladi - cross

1 conduction across the left elbow, correct; does it say that?

2 A. He's talking about entrapment.

3 Q. That's correct.

4 A. Okay.

5 MR. HEUBEL: Judge, this would be an appropriate time
6 to break.

7 THE COURT: Okay, ladies and gentlemen, we'll take
8 lunch break now. It's 1:05. We'll start back at 2:05
9 promptly.

10 (Continued on next page)

1CDZGIL4

Giladi - cross

1 (In open court; jury not present)

2 MR. DINHOFER: Would this be as good a time to revisit
3 the issue of the judicial notice?

4 THE COURT: Unfortunately, I have an appointment in my
5 chambers that I have to attend, so.

6 MR. DINHOFER: Before we bring back the jury, can we
7 address it?

8 THE COURT: Yeah, we'll try to do it quickly before.
9 I'll take a look at the -- the cases are not about that,
10 they're about fraudulent concealment.

11 MR. DINHOFER: The cases of fraudulent concealment,
12 yes.

13 THE COURT: So we'll try and address that before the
14 jury comes back. Okay.

15 By the way, Mr. Heubel, is Dr. Posner, is he available
16 today or not?

17 MR. HEUBEL: He's not, because I specifically asked
18 him to make sure that he cancelled his appointments all day
19 tomorrow.

20 THE COURT: Tomorrow morning.

21 MR. HEUBEL: And then I expect to work fairly
22 efficiently with him, and I will make every effort to do that.

23 THE COURT: Okay.

24 MR. HEUBEL: Now, I don't think I'll be much longer, I
25 guess I went about 40 minutes, I don't think I'll be too much

1CDZGIL4

Giladi - cross

1 more than that as it turns out this afternoon. So that's 2:05,
2 let's say by three something, I'll probably be finished. I
3 don't know how much redirect there's going to be.

4 THE COURT: Okay. Okay.

5 MR. HEUBEL: So you want us back here at?

6 THE COURT: Could you come back about five minutes
7 before 2:00?

8 MR. HEUBEL: Sure.

9 THE COURT: Okay.

10 MR. DINHOFER: Thank you.

11 THE COURT: Thanks.

12 (Luncheon recess)

13 A F T E R N O O N S E S S I O N

14 2:05 p.m.

15 (In open court; jury not present)

16 THE DEPUTY CLERK: Judge entering.

17 THE COURT: Okay, good afternoon, everyone. You
18 wanted me to take judicial notice of something?

19 MR. DINHOFER: Yes, sir.

20 THE COURT: What was that?

21 MR. DINHOFER: Okay, there are a bunch of statutes
22 that I cited.

23 THE COURT: In your jury instructions?

24 MR. DINHOFER: Right.

25 THE COURT: What relevance do they have?

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Giladi - cross

1 MR. DINHOFER: Okay, the statutes are relevant in
2 terms of the biased interest and motive of the defendants to be
3 deceitful, in covering up their own crimes at the time when
4 they did, such that now, of course, they have to stay
5 consistent with those crimes that they covered up back then.

6 I asked them before if they had knowledge of the
7 crime. I think I just asked it of Dr. Strauch. And the fact
8 that there is such a crime of filing a false operative report,
9 of filing these for purposes with insurance companies for
10 getting payment, these go to the motives of the defendants in
11 this case, and why they still don't acknowledge the injury that
12 they inflicted upon my client.

13 THE COURT: Mr. Heubel?

14 MR. HEUBEL: Judge, I certainly don't think, and this
15 is why I objected when that question was asked of Dr. Strauch,
16 I don't think that there has -- that the elements of any crime
17 have been either pled or made out by evidence in this case.
18 Simply by -- and then counsel wants to advise the jury as to
19 criminal statutes that have no part to play in this case. It's
20 not a criminal trial. He's not proving up an underlying crime.

21 And the reason I object also is because the term
22 "filing a false report," what does that mean to anyone?

23 THE COURT: Yeah, I think it's really attenuated. I
24 think it's -- I think it's prejudicial. I think prejudice
25 would substantially outweigh any probative effect, and I just

lcdzgill4a

Giladi - cross

1 don't think that's what this case is about. This is a medical
2 malpractice case. This isn't a criminal case. To the extent
3 that you want to make motive relevant, it's obvious what the
4 motive would be. I mean, you don't need some statute about
5 false filings to make clear what the motive would be. So
6 there's no sort of additional marginal probative value I think
7 that would be, would come close to outweighing the prejudice of
8 having all these statutes read, and it's just not what this
9 case is about, so.

10 MR. DINHOFER: I think on the fraudulent concealment
11 aspect of the case, it is exactly what the case is about.

12 THE COURT: Well, I think you should -- let's bring in
13 the jury.

14 MR. DINHOFER: Okay.

15 (Continued on next page)

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Giladi - cross

1 THE DEPUTY CLERK: Jury entering.

2 THE COURT: Good afternoon, ladies and gentlemen. You
3 may be seated. Welcome back.

4 We'll be continuing now with the cross-examination by
5 defendants of the plaintiff.

6 Mr. Heubel.

7 MR. HEUBEL: Thank you, Judge.

8 Q. Mr. Giladi, we left off I think following your visit in
9 1990 with Dr. Kaplan; remember that discussion?

10 A. Yes.

11 Q. Earlier today?

12 A. Yeah.

13 Q. Before lunch?

14 A. Uh-huh.

15 Q. And about the beginning of 1991, you went to see Dr.
16 Strauch at his office at Montefiore Hospital, correct?

17 A. Yeah, February.

18 Q. I'm sorry?

19 A. At the end of February, if I'm not mistaken.

20 Q. And the reason you went to Dr. Strauch is because you were
21 having difficulty after five or six hours of work with pain in
22 your hand, correct?

23 A. Talking pain of my hand, I'm talking about the wrist, about
24 this area.

25 Q. Well, did you?

lcdzgill4a

Giladi - cross

1 A. The hand.

2 Q. Did you explain to Dr. Strauch that you had pain in your
3 hand after five or six hours of work, and that that was
4 concerning to you?

5 A. Yes.

6 Q. And --

7 A. And also --

8 Q. After the first visit with Dr. Strauch, he sent you to have
9 some EMG studies done, correct?

10 A. That's correct.

11 Q. To Dr. Berger?

12 A. Yes.

13 Q. And you learned from the results of those studies, as you
14 had learned from previous studies by Dr. Kaplan, that you had
15 your left ulnar nerve entrapment at the elbow, true, that was
16 that was continuing to exist, did it not?

17 A. Incorrect. I have bilateral, meaning I have left and right
18 equally.

19 Q. I asked you if you had it in the left, correct?

20 A. Yes.

21 Q. And if you had -- if you have it bilaterally, you must have
22 it in the left, correct?

23 A. Yes.

24 Q. Now, at your -- you had a visit with Dr. Strauch on
25 July 19th, 1991 after he had sent you for those EMG studies,

lcdzgill4a

Giladi - cross

1 nerve conduction studies with Dr. Berger, correct?

2 A. That's correct.

3 Q. And at that -- and you've had an opportunity, as you sat
4 here during this trial, to see Dr. Strauch's notes for your
5 visits with him, correct?

6 A. Can you repeat the question, please?

7 Q. Sure. During the time that this trial has been ongoing,
8 you were seated at the table and you had access to a computer
9 screen and you saw various piece of evidence, documentary
10 evidence on the screen, right?

11 A. I saw that.

12 Q. And among those -- I'm sorry?

13 A. I saw.

14 Q. Okay. And among that, those documents were certain of Dr.
15 Strauch's records, right?

16 A. It's correct.

17 Q. And one of those records that you saw involved a visit on
18 July 19th, 1991, correct?

19 A. That's correct.

20 Q. And I put that on the screen, and it's part of plaintiff's
21 Exhibit two, Dr. Strauch's typed notes for 7/19/91.

22 Now, Mr. Giladi, do you see there that Dr. Strauch,
23 approximately three full lines from the bottom of that note --

24 A. I cannot hear you.

25 Q. I'm sorry?

lcdzgill4a

Giladi - cross

1 A. I cannot hear you.

2 Q. The bottom of that note 7/19/91?

3 A. Uh-huh.

4 Q. That paragraph, about three lines up from the bottom, on
5 the right side of the page there are the words as well as. Do
6 you see that, as well as weakness?

7 A. I see that.

8 Q. Okay. And it says --

9 MR. DINHOFER: Which line are you on? Can you point
10 to the line?

11 MR. HEUBEL: Sure.

12 MR. DINHOFER: Okay, sorry. I was on three from the
13 top.

14 Q. Now, perhaps I'll read from the whole sentence beginning is
15 the -- "his decreased sensibility was present in the hand on
16 all his digits." Do you see that?

17 A. Yes.

18 Q. And then it says "Has positive Tinel and positive Phelan."
19 Do you see that?

20 A. Yes.

21 Q. He also says "weakness of his thenar musculature."

22 Now, you know from sitting here that that's this
23 muscle under your thumb, right?

24 A. Okay.

25 Q. Yes?

lcdzgill4a

Giladi - cross

1 A. If you say so, yeah.

2 Q. You don't have to take my word for anything. Do you
3 understand that the thenar musculature is this muscle under the
4 thumb?

5 A. Okay. I understand now.

6 Q. And do you see where it says, following that, "And his long
7 flexors to the little finger." You see that? I'll point it
8 out here.

9 A. Yes, I see that.

10 Q. Now, Mr. Giladi, the long -- little finger is part of the
11 ulnar distribution, as you understand it, correct?

12 A. Yes, I do.

13 Q. And it's not half the ulnar distribution. The whole finger
14 is in the ulnar distribution; true?

15 A. Can you repeat, please? Can you repeat the question,
16 please?

17 Q. Not just half the little finger, but the whole finger is in
18 the ulnar nerve distribution as you understand it, correct?

19 A. That's correct.

20 Q. So that according to this note, Dr. Strauch found that you
21 had weakness in that finger, correct?

22 A. It's what the note said.

23 Q. Now, shortly after that in September, September 4th, 1991,
24 you had another visit with Dr. Strauch, correct?

25 A. That's correct.

lcdzgill4a

Giladi - cross

1 Q. And at that time you asked him for a letter?

2 A. That's correct.

3 Q. True?

4 A. As the note said, yes.

5 Q. The note reflects that you asked him for a letter, right?

6 A. Yes.

7 Q. Do you have any reason to doubt that?

8 A. No.

9 Q. And, in fact, Dr. Strauch complied with your request and he
10 gave you a letter on July 3rd -- I'm sorry, let me back up a
11 little bit.

12 You saw Dr. Strauch on July 19th, 1991, and on
13 July 30th, 1991 he gave you a letter concerning your service in
14 the military?

15 A. Yes.

16 Q. Right?

17 A. Yes, with regard to the carpal tunnel syndrome.

18 Q. Similar to the type of letter you got from Dr. Kaplan years
19 before?

20 A. That's correct.

21 Q. True?

22 A. That's correct.

23 Q. And that letter that Dr. Strauch gave you, and I'll put it
24 up on the Elmo in a second, that letter was something like you
25 had asked of Dr. Kaplan, something that you needed to avoid

lcdzgill4a

Giladi - cross

1 being called to military service because of your physical
2 complaints and your physical condition?

3 MR. DINHOFER: He just asked that two questions ago.

4 THE COURT: It's okay for clarification.

5 A. First of all, this letter was not to avoid military
6 service.

7 Q. I don't think I said avoid, but let me rephrase the
8 question then.

9 The letters that you asked for of Dr. Kaplan and Dr.
10 Strauch, those letters were to be turned over by you to
11 military authorities in Israel in the event that you were
12 called upon to provide some military service in and around the
13 time that these letters were written?

14 A. Yeah.

15 Q. True?

16 A. This letter is to give my superior pictures in what kind of
17 duty can be fit with the condition I was at the time.

18 Q. And Mr. Giladi, if you knew -- withdrawn. These --
19 withdrawn.

20 This particular letter -- and I'm putting it on the
21 screens now, part of Exhibit two, plaintiff's Exhibit two -- do
22 you see in the second paragraph, which is only a sentence long,
23 the same reference to weakness in the long flexors to the
24 little finger?

25 A. This is Dr. Strauch's examination. It's not my complaint.

lcdzgill4a

Giladi - cross

1 Q. Well, did you tell Dr. Strauch, wait a second, I don't have
2 any problem with my little finger, I can't bring this to the
3 Israeli army; did you say that?

4 MR. DINHOFER: Objection. That's not at all what the
5 report says. He's mischaracterizing the document in evidence.
6 Doesn't say there is a problem with the little finger. It says
7 there is a problem with the long flexor muscle to the little
8 finger. That's the name of the muscle, not the finger.

9 MR. HEUBEL: I'll withdraw and rephrase.

10 THE COURT: Rephrase the question.

11 Q. Mr. Giladi, did you tell anyone in the military that this
12 is incorrect, that you do not have weakness in the little
13 finger?

14 MR. DINHOFER: Objection. Again, it's
15 mischaracterizing. It doesn't say it has weakness in the
16 little finger. It says weakness to the long flexor of the
17 little finger.

18 Q. Mr. Giladi, did you read this letter when Dr. Strauch gave
19 it to you?

20 A. I read his letter. The letter said, on physical
21 examination. This is not my word. This is Doctor impression.
22 And I cannot argue with what the Doctor's writing with regard
23 to his examination. This is what he's writing his examination.

24 I cannot -- if the doctors in the army got this letter
25 and if he's like to confirm it, he has to, he was to confirm

lcdzgill4a

Giladi - cross

1 it. This is the army to decide. Said very clear, on physical
2 examination. Did not say that the patient notify me or told
3 me. So if I did not say it, it's not my word. It's the doctor
4 examination. This is what the doctor feel.

5 Q. So the answer to my question is, no, you didn't tell anyone
6 that there was an error in that letter?

7 A. I do not know there is error or not. This is doctor
8 examination. How can I say that? The doctor did wrote an
9 examination.

10 Q. The reason that you didn't object to it is because you knew
11 that you had weakness and numbness in the ulnar distribution
12 even before you went to see the doctor?

13 A. This is, this is your interpretation, not mine, and I never
14 said that.

15 Q. Now, Dr. Strauch -- you told us the other day, when you
16 testified initially, that when you had your first postoperative
17 visit to Dr. Strauch's office, that he wouldn't give you a
18 letter documenting that you were sick, not in condition to go
19 to work; do you remember that?

20 A. Yes.

21 Q. Now, at the time you saw Dr. Strauch that day, your arm was
22 still in a cast, right?

23 A. Absolutely.

24 Q. And you said that you complained to him of pain, right?

25 A. I complained from the minute I woke up from surgery.

lcdzgill4a

Giladi - cross

1 Q. And you asked Dr. Strauch to give you a letter about that,
2 a note?

3 A. No, I did not say a letter. I said I need I need a form
4 for my boss that I cannot perform my job, my work duty, and I
5 need to be excused.

6 Q. Okay. So you needed documentation from Dr. Strauch about
7 your work and your inability to perform it, right?

8 A. He's the surgeon, he's the surgeon. He's the only one can
9 give it to me.

10 Q. Well, that's what you asked him for, right?

11 A. Based on my conversation with him, he supposed to have it
12 ready for next Wednesday, because this is what he promise me
13 before surgery. It was not done.

14 Q. Now you're saying that you asked for it before surgery?

15 A. This is routinely -- he's supposed to give it to me on
16 discharge date. When he discharge me from the hospital, the
17 form of discharge said, not to return to work. This one was
18 not in the discharge form.

19 The next thing I believe it should be when I come to
20 his office. This is not then either. So I had to ask him for
21 the paper.

22 Q. Well, when Doctor -- when you asked Dr. Strauch for the
23 letter for the military in July, he gave you that, didn't he?

24 A. When did I ask him how long it took?

25 Q. I don't know. He gave it to you, didn't he?

lcdzgill4a

Giladi - cross

1 A. He also gave me the disability form when he give it to me.

2 Q. He also gave you three forms to continue your disability
3 longer at the time?

4 A. Gave it to me three weeks after the fact.

5 Q. And he also gave you another letter later on with respect
6 to the military; true?

7 A. Because he know that I cannot do the service. He knew
8 exactly that I have a problem with my hand and I can not do the
9 service.

10 Q. And he willingly gave you a letter for that; true?

11 A. He gave me a letter, but he also wrote that, that I have a
12 transposition. Then -- and this is very risky for me to say
13 that I have a transposition. Because if I will say that I want
14 to do army and they give me a duty that, that I will be in
15 administrative work, not as a combat, but I will be going with
16 the force into the enemy area, and I got injured, and they need
17 to do an IV, then I gone to start work on my left hand or I
18 need to do anything. In that opinion, my nerve is moved
19 from -- moved. So this going also to confuse the medical
20 facility in the army, no? So his letter that he give me was a
21 false letter.

22 Q. Now, Mr. Giladi, there came a time, you told us earlier
23 this morning, that you took five weeks vacation in Israel?

24 A. Yes.

25 Q. As you said, to get some answers with respect to your --

lcdzgill4a

Giladi - cross

1 A. With a combination of seeing my family at the time also,
2 but at the time I'm seeing my family, I'm doing investigation
3 about seeing a physician, sure.

4 Q. And you told us that you took that vacation starting
5 sometime in November?

6 A. I do not know I said exactly. I know that I took it and I
7 came back in January. That's the only thing I remember.

8 Q. So do you recall telling us this morning, Mr. Giladi, that
9 you took that vacation sometime starting in November or
10 December of 1992?

11 A. I said I took it either the end of November or beginning of
12 December, and I came back to the United States in January.

13 Q. Okay. So we're in agreement then?

14 A. Absolutely.

15 Q. You left in November or December.

16 Now, the last visit that you had with Dr. Strauch,
17 before you left on this vacation was in October of 1992,
18 correct?

19 A. That's correct.

20 (Continued on next page)

1CDFGIL5

Giladi - cross

1 Q. And isn't it a fact, Mr. Giladi, that Dr. Strauch told you
2 that he had not transposed the ulnar nerve before you ever went
3 on that vacation?

4 A. It is not true. He implied one time which make me assume
5 that this is the situation. When I came to him to his office
6 and he told me that I am laying down, laying on my nerve. This
7 implied that the nerve was not being transposed. Then three
8 weeks later he was giving me a letter saying that the nerve was
9 being transposed. So now my question is, the nerve is being
10 transposed or not being transposed. On the one hand the doctor
11 implying that the nerve was being transposed, tell me that the
12 nerve was not being transposed, on the other hand, he's
13 implying that it is not. When I asked him clearly --

14 Q. My question to you --

15 MR. DINHOFER: Your Honor, he was still answering. He
16 was interrupted.

17 A. If the doctor told me clearly, I never transposed the nerve
18 and he will tell me that we had the problem in the OR, the
19 nerve was being niched and we did not transpose the nerve, as I
20 said before we would not be sitting here. I would go to
21 immediately take care of the problem and take care of the
22 problem. This was never been done.

23 Q. And --

24 MR. DINHOFER: Let him finish.

25 THE COURT: The question is, isn't it a fact that

1CDFGIL5

Giladi - cross

1 Dr. Strauch had told you he had not transposed the ulnar nerve
2 before you went on that vacation.

3 A. By this, word by word, I did not transpose the nerve, he
4 never said it.

5 Q. And if he had, as you said, we wouldn't be here, right?

6 A. Because I will be taking care of my body and I'm not going
7 to be in a situation which I have today.

8 Q. And there would be no basis for this lawsuit, right?

9 A. No, that's not what I'm -- the lawsuit is not based on
10 transposed or not transposed. This is not the case.

11 Q. So that doesn't matter.

12 A. What?

13 Q. So it doesn't matter whether it was transposed or not
14 transposed?

15 A. What's important is that he injured the nerve, concealed
16 the fact and lied to me over two years and told me over two
17 years, a year and a half, two years, that on a regular basis
18 that the nerve was transposed.

19 Q. Well, let me ask you this.

20 A. But the point is he never told me the nerve was severed.
21 He -- if he told me that I will go for surgery immediately to
22 fix it.

23 MR. HEUBEL: Judge, could he be asked -- I don't care
24 how long it takes to answer the question, as long as we're
25 answering the question.

1CDFGIL5

Giladi - cross

1 MR. DINHOFER: But the objection is still an
2 interruption of the finishing of the answer, your Honor.

3 THE COURT: As long as he's finishing the answer and
4 answering the question. He shouldn't be answering other
5 questions, nonresponsive questions.

6 MR. DINHOFER: In good faith, he is answering the
7 question, Judge, to the best of his ability.

8 THE COURT: You may continue.

9 MR. HEUBEL: Thank you.

10 Q. Mr. Giladi, earlier, much earlier, in fact, in June of
11 1995, you gave your first in a series of depositions in this
12 case, is that right?

13 A. That's correct.

14 Q. And you were represented by counsel at that deposition,
15 true?

16 A. Yes.

17 Q. And you spent some amount of time with your attorney
18 preparing for that deposition, correct?

19 A. Could be we were talking, but --

20 Q. What?

21 A. Could be we were talking, but he did not tell me what to
22 say.

23 Q. I didn't suggest that he told you what to say. Did I say
24 that?

25 A. Repeat your question.

1CDFGIL5

Giladi - cross

1 Q. My question was did you spend some time in preparation for
2 that deposition with your attorney?

3 A. Yes. We spent some time in preparation, yes.

4 Q. And you understood when you gave that deposition that you
5 were under oath, correct?

6 A. Yes.

7 Q. And you knew that everything you said was being recorded,
8 right?

9 A. Yes.

10 Q. Do you remember at page 210 --

11 MR. DINHOFER: One second.

12 Q. You were asked this question and giving this answer,
13 beginning at line 20.

14 MR. DINHOFER: One second, please. How far are you
15 planning on going?

16 MR. HEUBEL: Line 20, page 210.

17 MR. DINHOFER: To where?

18 MR. HEUBEL: To the top, the end of the question.

19 Q. So, do you remember, Mr. Giladi, being asked this question:
20 "Q. Why don't you tell me what happened, then, over the
21 balance of your visits with Dr. Strauch as best you can in
22 chronological order.

23 "A. Okay. On one of the visits I asked Dr. Strauch why I have
24 the pain in the back of my elbow when the nerve was being
25 transposed and moved to the front. And he told me that the

1CDFGIL5

Giladi - cross

1 transposition never took place."

2 MR. DINHOFER: I have an objection, your Honor. If
3 you read this section in its full context in quotation it's
4 clear that what the question is referring to is the later
5 conversation in January of '93 that my client testified to and
6 not the conversation immediately postoperative.

7 MR. HEUBEL: Judge, he's free to read whatever he
8 wants --

9 MR. DINHOFER: It's misleading. As counsel pointed
10 out --

11 THE COURT: I can't tell from the context.

12 MR. DINHOFER: Maybe we should have a sidebar, your
13 Honor.

14 MR. HEUBEL: Your Honor, he just told --

15 THE COURT: He can clarify it.

16 MR. HEUBEL: Could I have an answer to my question,
17 Judge?

18 THE COURT: Yes.

19 A. Yes, I think today during my testimony I clearly indicated
20 that when I came back from Israel with the EMG report from
21 Dr. Sadeh I asked Dr. Strauch regarding the transposition and
22 he took his notes and he told me that based on his office notes
23 the nerve was not being transposed, but based on the surgical
24 report the nerve was transposed. And it's not any
25 contradiction to what this note, what happened during my

1CDFGIL5

Giladi - cross

1 deposition. He did say, but he never, he never confirmed that
2 he said. He said on one hand, one record said yes, one record
3 said no. This why I went to Dr. Spinner and this is why I went
4 to Dr. Roussio and this is why I went to Dr. Beasley.

5 Q. My question was, Mr. Giladi, were you asked this question:
6 "Why don't you tell me what happened, then, over the balance of
7 the visits with Dr. Strauch as best you can in chronological
8 order.

9 "A. Okay. On one of the visits I asked Dr. Strauch why I have
10 pain in the back of my elbow when the nerve was being
11 transposed and moved to the front and he told me that the
12 transposition never took place."

13 Did you say that answer to that question or not?

14 A. I just said now that on one of the visits --

15 Q. I'm not asking what you said now.

16 A. On one of the visits --

17 MR. HEUBEL: Judge, could I have an answer to my
18 question?

19 MR. DINHOFER: He keeps interrupting. He's trying to
20 answer and Mr. Giladi keeps talking over --

21 THE COURT: Just stop, stop. You may answer the
22 question.

23 A. I said it very clear today during the first part of my
24 testimony when my lawyer asked me the questions and I said very
25 clear when I came back from overseas with the EMG report,

1CDFGIL5

Giladi - cross

1 Dr. Strauch gave me two answers in one breath. On one hand he
2 said it was done. On the other hand he said it was not done.
3 This why I start to seek for medical opinion of more doctors
4 like Dr. Spinner, Dr. Beasley, Dr. Rousso.

5 I never say he did not say it. He say it but he did
6 not confirm it. He never said to me clear your nerve was not
7 transposed because we had a problem and we injured your nerve.
8 He never said that. He never said that the nerve was
9 transposed or not transposed. He said the nerve was being
10 transposed on one hand. The report said transposed, my notes
11 said not transposed. So yes, he said not transposed, but he
12 also said transposed. He said both.

13 Q. Are you finished?

14 A. But this note saying yes, he did say that, but I did not
15 say here everything that he said like I said it it today.

16 Q. Now, do you remember being asked this question, Mr. Giladi,
17 at page 212, line 15 to the following page, line 9.

18 "Q. After this discussion with Dr. Strauch about the
19 transposition, what's the next thing you remember happening?

20 "A. I believe before December of 1992 I told that to him."

21 A. As I said, as I said before --

22 MR. DINHOFER: Excuse me, that was not what the
23 deposition said. It said not "that is what I told to him" but
24 it said -- you misread it.

25 MR. HEUBEL: I'll read it again.

1CDFGIL5

Giladi - cross

1 MR. DINHOFER: "I told him that."

2 Q. "I believe before December of 1992 I told him that."

3 A. What did I tell him?

4 MR. DINHOFER: There's more to the response.

5 Q. I'll continue. "He said with time things will be better
6 and it's already almost a year and things are the same. How
7 much longer do I have to wait until things will be better
8 because I am very frustrated and I would like to know what to
9 do. He told me that everything is in my head and I have no
10 problem at this time."

11 Do you remember being asked that question and giving
12 those answers? That answer.

13 A. Yes, and because he told me that everything is in my head I
14 took the time off.

15 Q. So the discussion when Dr. Strauch told you that he had not
16 transposed the nerve took place before you went on vacation in
17 November or December of 1992, correct?

18 A. No. If you recall, if you recall the question that I was
19 being asked by defense attorney prior to my answer, he asked me
20 what happened to the rest of the time. I said very clear
21 before --

22 MR. HEUBEL: Judge, may I ask that the witness --

23 MR. DINHOFER: He's answering.

24 THE COURT: Please, stop.

25 MR. DINHOFER: He keeps interrupting the answer.

1CDFGIL5

Giladi - cross

1 THE COURT: Please focus on the question. So the
2 discussion when Dr. Strauch told you that he had not transposed
3 the nerve took place before you went on vacation between
4 November and December of '92, correct?

5 THE WITNESS: I still do not understand what he try to
6 get from me. I am trying to respond to the line of questions
7 that he's asking. Everything is being taken out of contact.
8 It was all this line of questioning started with the question,
9 when I responded, I was being asked to say what I recall not in
10 a chronological order, and I was just talking best of my memory
11 what's happening at the time.

12 THE COURT: Okay, but try not to focus on the line of
13 questions. It's cross-examination and you have to answer a
14 specific question that counsel asked.

15 THE WITNESS: I will do my best, your Honor.

16 Q. So my question was, do you remember that the discussion
17 that you testified about at your deposition where Dr. Strauch
18 told you that he had not transposed the nerve happened before
19 December of 1992? Yes or no?

20 A. As I said minutes ago, he never told me clear before
21 December, December, as I said before. Everything that I said
22 there is a mix of my recollections. I did not put time line
23 there. I was just talking in general and I was changing gears
24 from one location to another.

25 I took the five weeks vacation because he told me that

1CDFGIL5

Giladi - cross

1 I am hypochondriac and I said that this morning, too.

2 Q. Mr. Giladi, you stated in your deposition that Dr. Strauch
3 told you that he had not transposed the nerve, correct? At
4 some point that's what he told you.

5 A. Yes, in January --

6 Q. And you also said in response to this question, line 15 of
7 212, "After this discussion with Dr. Strauch about the
8 transposition, what's the next thing you remember happening?"

9 "A. I believe before December of 1992 I told him that."

10 So this discussion about the ulnar nerve happened
11 before December of 1992, correct?

12 MR. DINHOFER: Your Honor, this is now out of
13 context --

14 THE COURT: Counsel, counsel. I don't want speaking
15 objections.

16 MR. DINHOFER: May we approach at the sidebar now,
17 because this is definitely out of context now. If you read the
18 questions before --

19 THE COURT: Shh. Shh. Shh.

20 MR. HEUBEL: Judge, I'll be happy to read the entire
21 thing.

22 THE COURT: Sidebar.

23 (Continued on next page)

1CDFGIL5

Giladi - cross

1 (At the side bar)

2 THE COURT: Let me see --

3 MR. DINHOFER: If you read the questions before, he's
4 talking about when he went to work and that's why he's saying
5 in '92 he told him that. It's totally out of context.

6 THE COURT: Which line were you reading?

7 MR. HEUBEL: I started --

8 MR. DINHOFER: It was this line here he was reading,
9 and I was talking about what happened before. Do you need
10 glasses?

11 MR. HEUBEL: It was 210, line 20, to 213, line 7.

12 MR. DINHOFER: Where I made the down arrows, the
13 specific part he was just reading right now, Judge, it's
14 totally out of context. That's what he read before that I'm
15 going to come back to that's out of context.

16 MR. HEUBEL: It's clearly one discussion, Judge.

17 MR. DINHOFER: This transcript, by the way, goes
18 across and then across. Doesn't go up and down like the other
19 ones.

20 THE COURT: I don't understand why it's out of
21 context.

22 MR. HEUBEL: It's clearly one discussion.

23 MR. DINHOFER: He's saying I told him that in December
24 '92, but first this question here about going back to work and
25 what was going on at work in December of '92 and not about the

1CDFGIL5

Giladi - cross

1 conversations he had with Dr. Strauch about the ulnar nerve
2 transposition not being done and it's mischaracterizing the
3 testimony in every which way by that.

4 THE COURT: I disagree.

5 MR. HEUBEL: Absolutely not.

6 MR. DINHOFER: It's totally off point in
7 characterizing what that response is in response to.

8 THE COURT: I don't think so. You can clarify it on
9 redirect.

10 MR. DINHOFER: I surely will.

11 (Continued on next page)

1CDFGIL5

Giladi - cross

1 (In open court; jury present)

2 BY MR. HEUBEL:

3 Q. Mr. Giladi, would you agree with me that if you had this
4 discussion with Dr. Strauch where you say that he had told you
5 that he had not transposed the nerve, that if you had that
6 conversation before you went on vacation in or around November,
7 1992, then you knew when you left for Israel and when you met
8 with Dr. Sadeh and when you met with Dr. Rousso that your ulnar
9 nerve had not been transposed, correct? And I'd like a yes or
10 no answer to that question.

11 MR. DINHOFER: Objection, your Honor.

12 Q. Or you can tell me otherwise if you can't answer it that
13 way.

14 MR. DINHOFER: Thank you.

15 A. At first I may used a wrong word during my deposition and
16 what I've been trying to say that he implied --

17 MR. HEUBEL: Judge, if I may interrupt --

18 MR. DINHOFER: Excuse me.

19 MR. HEUBEL: It's a simple question. If the
20 discussion was had before you went on vacation, then he knew
21 before he spoke to Rousso and before he spoke to, rather,
22 before -- right, and before he spoke to Sadeh that his ulnar
23 nerve had been transposed.

24 THE COURT: Can the witness answer the question?

25 MR. DINHOFER: He was answering. This is a chronic

1CDFGIL5

Giladi - cross

1 thing. He keeps objecting in the middle of the witness' answer
2 as a pretext.

3 THE COURT: And you keep speaking when you shouldn't.

4 MR. DINHOFER: Because it's frustrating to hear him do
5 this and not let the witness answer.

6 THE COURT: There you go again.

7 Can the witness answer the question?

8 THE WITNESS: Yes, your Honor.

9 THE COURT: Okay.

10 A. I know that the nerve was not being transposed not by
11 Dr. Strauch, by Dr. Goodrich, who implied that it is a
12 possibility that that nerve has not been transposed and the
13 nerve has been injured.

14 Q. And you saw Dr. Goodrich before you went on vacation,
15 right?

16 A. That's correct.

17 Q. Thank you.

18 Now, Mr. Giladi, when you eventually met with, at some
19 point you told us, and we saw some notes of Dr. Goodrich to
20 this effect, that you had scheduled a surgery with respect to
21 your ulnar nerve in November, I think November 11 of 2011 --
22 1992, correct?

23 A. 1993.

24 Q. 1993? I'm sorry.

25 MR. HEUBEL: Excuse me just a moment, Judge.

1CDFGIL5

Giladi - cross

1 (Pause)

2 Q. Now, Mr. Giladi, after you had the -- by the way, between
3 Dr. Strauch's surgery and the surgery by Dr. Rousso in April of
4 1994, you treated the pain in your elbow that you told us about
5 with over the counter pain medication, true?

6 A. Mostly, yes.

7 Q. Tylenol, Motrin, things like that, correct?

8 A. Yeah, without --

9 Q. Once you got out of the hospital, is that correct?

10 A. Maybe once or twice I got prescription, but not on a
11 regular basis.

12 Q. So over the course of that time from December of 2001, once
13 you were discharged from the hospital until April of 2004, you
14 treated yourself with a couple of exceptions solely with over
15 the counter pain medications like Tylenol and Motrin, right?

16 A. What my physician provide me with, that's what I had to do.

17 Q. And that was true of your physician Dr. Strauch or any of
18 the other physicians you went to with the possible exception of
19 a couple of times, right?

20 A. Yes.

21 Q. And after Dr. Rousso performed the surgery and since that
22 time you remarried, correct?

23 A. Yes.

24 Q. You met your wife, socialized, you met her?

25 A. I'm not saying I socialized. I just got -- I got married.

1CDFGIL5

Giladi - cross

1 I said very clear I'm not socialized the way I used to.

2 Q. I'm not asking you if it was the way you used to, but it
3 was enough to meet someone and get married, correct?

4 A. Yes.

5 Q. And from that marriage, you since that time have had two
6 children, correct?

7 A. Yes.

8 Q. Now, you told us that your relationship with your children
9 from the prior marriage is somewhat strained? Some problems
10 there, that you attribute to your elbow pain? Is that correct?

11 A. Put it this way: In every divorce you have a problem.
12 Sometime parents try to work very hard to resolve this problem.
13 When they have one party looking for some issues to create
14 problem, you try to avoid it. In my situation, I couldn't
15 avoid it if my ex-wife tried to alienate the kids from me and
16 she have a good reason, your father's not coming, your father
17 said he would be here at 6:00, at 10:00, he can't make it, he's
18 not coming. Because I called and said I cannot drive, I cannot
19 come because of my pain, and this is creating, giving
20 ammunition against me to the kids, who as of today are blaming
21 me for that time because I did not want to come.

22 Q. Mr. Giladi there was a time and you told us earlier that
23 you came to understand that your wife had stabbed you, correct?
24 Did you tell us that?

25 A. Yes, it was in '87.

1CDFGIL5

Giladi - cross

1 Q. And that she had some hostility towards you, correct?

2 A. I'm not denying it.

3 Q. I'm sure you're not, because you told us about that.

4 A. I'm not denying it.

5 Q. And subsequent to that, according to Dr. Strauch's
6 records -- excuse me, I'll get to it in a second.

7 Was there a time, Mr. Giladi, when you told
8 Dr. Strauch that your wife had traumatized your left upper
9 extremity, your left arm?

10 A. It's not exactly what I told him.

11 Q. Did you tell him something in sum and substance like that?

12 A. I told him that she was trying to hurt my hand because she
13 know this hand is very sensitive. She grabbed me in my hand
14 and when I said my hand, usually I talk about this area, and I
15 was able, and I was just moved away from her and this is what
16 happened. And I told him that I need to know what's going on
17 and I need to have help, because people, she's using it against
18 me. This is what I told him. I just give him another issue to
19 raise to him that my condition is not a proper condition and I
20 have, I'm not functioning normal and I cannot deal with on a
21 daily basis with things that are happening and people are using
22 this against me.

23 Q. Mr. Giladi, eventually you were involved in a divorce
24 action with your wife, correct?

25 A. This is before that.

1CDFGIL5

Giladi - cross

1 Q. This was before that?

2 A. My divorce was over before my surgery.

3 Q. Your divorce ended in 1990, right?

4 A. That's correct.

5 Q. And there was also a custody battle as part of that, true?

6 A. Yes, and we have joint custody.

7 Q. And do you think that perhaps your children suffered
8 because of that and that some of your relationship with them is
9 affected by those times?

10 A. Before my surgery I had a relationship with my kids. I
11 used to go with him to the swimming pool. He endured some
12 issues, but today when I speak with my older son he constantly
13 remind me of the period where I used to call and not to show
14 up, after my surgery. Today as a physician he understand, this
15 is why I get along with him very well. The youngest maybe in a
16 few years he will understand, but in the meantime he doesn't
17 want to understand it.

18 Q. Since you mention it, Mr. Giladi, you can drive, right?

19 A. Not in a big -- not in the beginning and every time -- and
20 I did my driving limited to the point only when necessary and
21 mandatory. I used to go to work by train and buses. I used to
22 use the car only when I had a location shoot when I had to rent
23 equipment, take it to work and return it. For many years I did
24 not even own the car because I do not drive. Whenever I need
25 to have a car I used to borrow from a friend or rent.

1CDFGIL5

Giladi - cross

1 Q. Mr. Giladi, you can drive today, right?

2 A. I drive with some limitation. I need to have a wide car.
3 I cannot drive with small cars. I need to have space for my
4 elbow.

5 Q. But you can drive, that's my question.

6 A. What?

7 Q. You can drive, can you not?

8 A. A person with impotent hand can drive too.

9 Q. In fact, in July of this year you drove from your home in
10 New Jersey to a physical examination in Manhattan by
11 Dr. Posner, correct?

12 A. No, I did not drive.

13 Q. And you drove back --

14 A. Yes, I drove, you're right.

15 Q. Of course I'm right.

16 MR. DINHOFER: Objection.

17 Q. And you drove back, too?

18 THE COURT: Sustained.

19 Q. You drove back too, right?

20 A. 20 minutes ride and I have a wide car and comfortable car
21 and I spend extra money because of my medical condition. I
22 have kids. I have kids to take care of and somebody have to
23 take care of them and I need the car.

24 Q. By the way --

25 A. And I said earlier, I try to live my life as somebody who

1CDFGIL5

Giladi - cross

1 have no disability. I do my best to take care of myself, to
2 take care of my family.

3 Q. And at the present time, Mr. Giladi, you still continue to
4 use only over the counter medications to treat whatever pain
5 you have in your elbow, true?

6 A. Not always.

7 Q. True? Most of the time?

8 A. I'm not seeing a physician on a regular basis.

9 Q. So you can't, so you haven't gotten prescriptions for pain
10 medication other than -- you haven't gotten prescriptions for
11 pain medications because you're not seeing physicians
12 currently, right?

13 A. I'm not taking medication for a reason that, my condition
14 is a chronic pain at the moment, which used to -- what I had in
15 the beginning, it was a pain due to injury. After six years,
16 seven years and Dr. Rousso said it very clear, my condition
17 began to be a chronic. Chronic pain is something that will
18 stay with you forever. I --

19 Q. My question only was, Judge, whether he's taking other than
20 over the counter pain medication at the present time.

21 THE COURT: That is the question.

22 Q. Isn't that correct, that you're taking only over the
23 counter pain medication at the present time?

24 A. Yes.

25 Q. And, Mr. Giladi, you've done a lot of traveling by airplane

1CDFGIL5

Giladi - cross

1 from outside the country and within the United States since you
2 had your surgery by Dr. Rouso, correct?

3 A. Yes.

4 Q. You go back to Israel frequently, is that right?

5 A. When you say frequently, can you specify what it is
6 frequently for you.

7 Q. Ten times a year?

8 A. Absolutely not.

9 Q. Five times a year?

10 A. How many?

11 Q. Five?

12 A. Absolutely not.

13 Q. Have you traveled to Las Vegas?

14 A. Give a period.

15 Q. In 2000?

16 A. Hmm?

17 Q. 2000, 2003, 2004, 2005. In the period from 2000 to 2010,
18 you've done a fair amount of traveling outside the country and
19 within the country by airline, correct?

20 A. Just to let you know, since the beginning of this year I
21 did not travel to Israel at all.

22 THE COURT: That doesn't answer the question.

23 A. I don't have a list of how many times I travel. My
24 traveling is limited in some way and sometime I went more,
25 sometimes I went less, but every time I travel with an

1CDFGIL5

Giladi - cross

1 airplane, I took medication.

2 Q. But you managed to travel, true? Sometimes for vacation,
3 sometimes to visit family, right?

4 A. I'm not denying that I'm trying to function as a human
5 being.

6 Q. And I think you told us on the first day that you're the
7 primary caregiver at home?

8 A. Yes, I do.

9 Q. And does that mean that you get to spend a lot of time with
10 your kids?

11 A. A lot of time between schools and sleep. A few hours a
12 day, yes.

13 MR. HEUBEL: Nothing further, Judge. Thank you.

14 MR. DINHOFFER: I'm not going to be long, Judge.

15 THE COURT: Okay. Redirect.

16 MR. HEUBEL: I'll leave the exhibits up there.

17 MR. DINHOFFER: Thank you.

18 REDIRECT EXAMINATION

19 BY MR. DINHOFFER:

20 Q. Mr. Giladi, when you travel by air, do you take any special
21 precaution in terms of the seating that you have on the
22 airlines?

23 A. Yes. I make sure that my seat will be to the window, I
24 make sure to the window that I sit will be to my left -- that
25 no people will be to my left side.

1CDFGIL5

Giladi - redirect

1 Q. Why is that?

2 A. To protect my elbow because any touch of my elbow will
3 create pain and electric shock to the fingers.

4 Q. Now, Mr. Heubel started questioning you with references
5 to Dr. Spinner. Do you remember that questioning?

6 A. Mm-hmm.

7 Q. And he was questioning you about complaints that you had.
8 Did you offer any complaints to your little finger?

9 A. No.

10 Q. Were you offering complaints to any other part of your
11 hand?

12 A. If I complain anything, I complained about finger one, two
13 and three, maybe, but again, most of my complain about the
14 biceps.

15 Q. Okay. You were complaining about the biceps from the
16 anesthesia problem you had?

17 A. Yes.

18 Q. When it said in I think Dr. Kaplan's records that you were
19 having a problem from the elbow to shoulder, is that what he's
20 referring to?

21 A. Yes.

22 Q. At any time did Dr. Spinner give you any kind of treatment
23 for your elbow?

24 A. No.

25 Q. Did Dr. Kaplan give you any treatment for your elbow?

1CDFGIL5

Giladi - redirect

1 A. No.

2 Q. Now, when you went to see Dr. Strauch, counsel made a big
3 point about the long flexor of the little finger. Did you say
4 to Dr. Strauch I have a problem with my long flexor of my
5 little finger?

6 A. No.

7 Q. Is it only through this litigation that you came to
8 understand that there is such a muscle called long flexor of
9 the little finger?

10 A. Yes.

11 Q. I'm sorry?

12 A. Yes.

13 Q. In fact, can we agree that when you went to Dr. Strauch you
14 never complained initially about any problem with your little
15 finger?

16 A. No, I complained -- my complaint was only about finger one,
17 two and three, after prolong time of work and up through the
18 wrist. That was it.

19 Q. And when you were complaining about weakness in your hand,
20 where was the weakness that you were complaining about when you
21 first went to Dr. Strauch in your hand?

22 A. I complain about the weakness in my hand, about the three
23 fingers when I'm trying to work, and Dr. Strauch told me that
24 the weakness is because of the pain, I don't have any weakness,
25 he doesn't find any weakness in my hand. This is what I

1CDFGIL5

Giladi - redirect

1 remember. I'm not sure.

2 Q. Okay. And there were no complaints at that time related to
3 fingers three and four -- four and five, right?

4 A. No. I did not complain about pain in my elbow or any
5 problem in my elbow or problem with these fingers until I woke
6 up from surgery.

7 Q. Now, an issue was made with regard to when you asked
8 Dr. Strauch for the letters for the military. Could you tell
9 us how long from the time when you first asked Dr. Strauch for
10 a letter to the military was it until you first received that
11 actual letter for the military?

12 A. I don't have the date in front of me, but it was not -- I
13 don't remember exactly the time, but --

14 Q. He didn't, when you first asked him, he didn't run right
15 away to a typewriter and type out a letter for you so that you
16 could have it right away, did he?

17 A. No, no. I had to come back later, after a while.

18 Q. Did it take a while until you got that letter?

19 A. Yes.

20 Q. Just like you asked him for the disability forms, it didn't
21 come right away, you had to --

22 THE COURT: Counsel, try not to ask any leading
23 questions.

24 Q. Was it the same thing with regard to the disability forms?

25 A. Disability forms I said before, I came on the 18th, I asked

1CDFGIL5

Giladi - redirect

1 him for the paper. He told me to go back to my boss, I talked
2 to him, I think it was sometime in January that I received the
3 first disability form.

4 Q. Mr. Heubel tried cross examining you with some portions of
5 your deposition transcript, and he read to you this part where
6 you answered that before December of '92 you told him that.
7 Can I read to you the questions preceding and see if that gives
8 context to what you were talking about in December of '92 when
9 you said "I told him that" to Dr. Strauch? Starting at page
10 211, line 20.

11 "Q. How were you doing on your job?

12 "A. Horrible.

13 "Q. In what way?

14 "A. Difficult to concentrate when you have a lot of pain and
15 you have to do creative work.

16 "Q. Anything else?

17 "A. Functioning with my hand. I couldn't function with my
18 hand. I could not operate with my hand.

19 "Q. That's your left hand?

20 "A. Yes. My left hand. I cannot operate with that.

21 "Q. Did you mention anything else about how you were doing at
22 work?

23 "A. This is my best recollection is what I told you. That's
24 all I can remember."

25 And this gets to the question you were asked.

1CDFGIL5

Giladi - redirect

1 "Q. After your discussion with Dr. Strauch about the
2 transposition, what's the next thing you remember happening?

3 "A. I believe before December of 1992 I told him that."

4 Having heard the full context of the question and
5 answer that led to that response, do you recall what you meant
6 when you said I told him about that?

7 A. I was talking about functioning at work.

8 Q. You weren't talking about the fact that there was any kind
9 of transposition in the questions leading up to that, were you?

10 A. No.

11 MR. DINHOFER: I have nothing further, your Honor.

12 THE COURT: Okay. That's all for this witness?

13 MR. DINHOFER: That's it.

14 THE COURT: Mr. Giladi, you may step down.

15 (Witness excused)

16 THE COURT: Shall we take a five-minute break? Okay,
17 let's take a five-minute break.

18 (Jury excused)

19 (Continued on next page)

1CDFGIL5

Giladi - redirect

1 (In open court; jury not present)

2 THE COURT: Is that it for plaintiff's case?

3 MR. DINHOFER: Let me talk with my client and see if
4 there's anything else we need to cover. I'm drawing a blank at
5 this second. Can I fall over when I say I rest? Literally?

6 THE COURT: Mr. Heubel -- am I saying your name right?
7 I've always said Heubel, is it Heubel?

8 MR. HEUBEL: I stopped directing people because it
9 gets worse than that. But it's Heubel. I think you started
10 out correctly.

11 MR. DINHOFER: I say Gerry.

12 THE COURT: I'm not going to say Gerry, I'll say
13 Heubel. Mr. Heubel, on the assumption that plaintiff rests,
14 you said you had a couple of applications.

15 MR. HEUBEL: Yes.

16 THE COURT: Do you want to preview those?

17 MR. HEUBEL: Yes. I'm going to move to dismiss as to
18 Dr. Sterman. I'm going to renew my application to deny
19 punitive damages in the case, as well as with respect to the
20 physician defendants and the hospital defendant and that's
21 about it.

22 THE COURT: Okay.

23 MR. HEUBEL: And generally to dismiss the failure to
24 make a prima facie case.

25 THE COURT: So a directed verdict essentially, or

1CDFGIL5

Giladi - redirect

1 dismissal. Dismissal.

2 MR. HEUBEL: For the whole case and specifically as to
3 Dr. Sterman and the hospital and then the punitive damages
4 aspect of the case again. I think that -- well, I won't argue
5 again.

6 THE COURT: One question, this is sort of out of the
7 blue, but one question I have is did Dr. Sterman live in New
8 Jersey when this case was filed? In 1994.

9 MR. HEUBEL: Yes.

10 THE COURT: And --

11 MR. DINHOFER: Plaintiff was living in Israel when the
12 case was filed.

13 THE COURT: Was the plaintiff living in Israel or
14 visiting Israel with his brother and mother?

15 MR. DINHOFER: His testimony was he lost everything
16 here and he couldn't afford to live here so he was living there
17 with his brother and mother, and he lived there until August at
18 which point he had the surgery with Dr. Rousso at which point
19 he came back to the United States to try it again.

20 THE COURT: So when the case was filed he was living
21 in Israel with the intent to stay there?

22 MR. DINHOFER: That's correct.

23 THE COURT: Because if he was a resident of New Jersey
24 and defendant was a resident of New Jersey, there ain't no
25 diversity jurisdiction.

1CDFGIL5

Giladi - redirect

1 MR. DINHOFER: I understand that, and he was very
2 clear that he was living with the intent to remain in Israel at
3 the time. That's exactly -- he was treating, he had his
4 surgery, he was staying there, he was treating, doing his
5 therapy and living his life there.

6 THE COURT: Okay. And I wanted to ask Mr. Heubel, on
7 a motion for mistrial relating to punitive damages, not getting
8 to the merits of punitive damages --

9 MR. DINHOFER: Not a mistrial?

10 THE COURT: You previously moved for a mistrial,
11 right?

12 MR. HEUBEL: I previously moved based on the fact the
13 doctors didn't have sufficient notice to retain counsel to
14 represent their uninsured interests in the case.

15 THE COURT: Why would they need separate counsel?

16 MR. HEUBEL: Because as counsel for the insureds, I'm
17 retained to represent them as to their insured interests.

18 THE COURT: But there's no divergence of interest as
19 to punitive damages, is there?

20 THE COURT: Well, there is enough that the defendants
21 were notified by their insurance company that they -- I don't
22 know the wording of the letter directly, but concerning
23 retaining separate counsel for their uninsured interests. And
24 that generally is what happens.

25 THE COURT: Yes, I've seen that.

1CDFGIL5

Giladi - redirect

1 MR. DINHOFER: That's actually a matter of the
2 client's bad faith action against the defense counsel who
3 failed to advise them that ten years ago we were claiming
4 punitive damages, that if there was some damage that accrued to
5 Dr. Strauch or Dr. Sterman because they weren't advised, then
6 they may have a claim against Parker O'Donald who was
7 representing them at the time or attorneys who filed the claim
8 at that time and they failed to act on that. Once they had the
9 notice that I gave them in the pretrial orders that we did and
10 the drafts that we did back in early 2000 or 2001, at that
11 point that information should have been communicated by those
12 attorneys and that's all that relates to is that possible bad
13 faith claim that they may have should a verdict come in for
14 punitive damages as against their former attorneys.

15 THE COURT: When you say notice ten years ago, you
16 mean the proposed jury instructions on punitive damages to
17 which the defendants objected?

18 MR. DINHOFER: But they still had notice nonetheless
19 that I was claiming it as part of this case and the law is
20 clear that I do not have to plead it.

21 THE COURT: It's true you don't have to plead it. You
22 have to plead sufficient facts in the complaint giving notice
23 to a factual basis for punitive damages. You don't have to use
24 the words "punitive damages" as a cause of action.

25 In any event, I wanted a little clarification of that.

1CDFGIL5

Giladi - redirect

1 If plaintiff rests now, would it be possible to proceed with
2 your remaining witnesses and then we can take up the motions
3 after letting the jury go? In other words, holding the motions
4 or applications in abeyance for an hour, a little more than an
5 hour?

6 MR. DINHOFER: Given the jury's express desires, that
7 would be smart.

8 MR. HEUBEL: I understand why the Court wants to do
9 that, but I feel compelled to ask the Court to address those
10 rulings before I proceed with my case in chief.

11 THE COURT: I appreciate that you feel you have to
12 request that, but I don't really see the prejudice in
13 proceeding. There's no -- I don't think there's any prejudice
14 with having you do those additional witnesses and I'll consider
15 the applications in an hour and twenty minutes.

16 MR. DINHOFER: Judge --

17 MR. HEUBEL: If your Honor were to resolve the
18 punitive damages question in favor of the defendants, that
19 might make a difference as to my case in chief.

20 MR. DINHOFER: Most Courts that I've appeared before
21 usually reserve decision on those motions that are made midway
22 through until after the jury renders its verdict in any event
23 because of the fact it avoids the necessity of a retrial in the
24 event there were error in the decision one way or the other.

25 THE COURT: Well, that's one of the options.

1CDFGIL5

Giladi - redirect

1 MR. HEUBEL: I understand that you have that option,
2 Judge. However, I think that it's clear enough having heard
3 plaintiff's case that this isn't a case for punitive damages
4 and that continuing the case with the specter of punitive
5 damages is not necessary and complicates the defense
6 unnecessarily.

7 MR. DINHOFFER: Well, the jury knows nothing about
8 punitive damages, so I don't see how it complicates the
9 presentation to the jury.

10 MR. HEUBEL: In terms of what I ask, who I put on the
11 stand and those types of decisions may differ depending upon
12 whether there's punitive damages left in the case or not. And
13 I think there comes a point, Judge, and when plaintiff has had
14 his opportunity to put in all his proof, where the Court can
15 decide that issue at this juncture.

16 THE COURT: I could, but I'm inclined to deny these
17 applications without prejudice and complete the evidence and
18 then reconsider them at the end of the evidence or possibly
19 until after a verdict, because I think it does put the record
20 in a better position for any future proceedings.

21 Let me ask you with respect to the punitive damages
22 issue. There was testimony from Dr. Rousso, in some ways it
23 might have been confusing because there was a lot of different
24 testimony and sometimes it wasn't sort of neatly in the form of
25 an expert report, but there arguably was testimony relating to

1CDFGIL5

Giladi - redirect

1 the perception of a laceration and also these issues about
2 whether a transposition was done or was not done. What's your
3 response to plaintiff's argument that the failure to inform, if
4 in fact the circumstantial evidence shows that that happened,
5 that this sort of mistake happened and informing the patient
6 about that sooner would have had a positive result and in fact
7 there was some quote-unquote fraudulent concealment of that,
8 why isn't that enough to support an instruction for punitive
9 damages?

10 MR. HEUBEL: Judge, I think that you first have to go
11 to the standard of proof, which for punitive damages is clear
12 and convincing, unequivocal evidence. And there's no way that
13 what we've heard up to this point in the trial through the
14 completion of plaintiff's case that there's anything that's
15 clear and convincing and unequivocal. And I think that then
16 the danger, and the Courts have said that, because what you're
17 actually asking the jury to do is punish somebody for really a
18 public wrong and that it comes close to criminality. So
19 because of that, the standard of proof is especially high and I
20 don't see how the plaintiff can meet that standard. I have
21 some case law with respect to that that I'd be happy to pass up
22 to the Court. The Court may be well aware of that.

23 THE COURT: The case law does -- there is a high
24 standard, it is gross recklessness, wanton or willful or
25 intentional conduct that warrants punishment.

1CDFGIL5

Giladi - redirect

1 MR. HEUBEL: But it has to be established not by a
2 preponderance of the evidence, but by clear and convincing
3 proof.

4 THE COURT: I'll need to check that. I wasn't certain
5 about that.

6 MR. DINHOFER: Even that would still be a jury issue
7 as to whether or not that threshold were met, and one could
8 very well say that Dr. Rousso's testimony that I went in there
9 and I saw this, is clear and convincing; that I took a
10 photograph of it and I'm pointing it to you in a photograph is
11 clear and convincing, and that's up to the jury to make that
12 decision ultimately as to whether that standard was met just
13 like in every other burden of proof question.

14 THE COURT: What about the application with respect to
15 Dr. Sterman? What's your basis for that?

16 MR. HEUBEL: Judge, the basis for that, my motion to
17 dismiss the case as to Dr. Sterman is I think that there's
18 ample evidence in the record so far and in terms of plaintiff
19 making his prima facie case, that in fact plaintiff hasn't.
20 The testimony has been that Dr. Strauch's custom and practice
21 is not to allow residents to cut tissue. Dr. Iriizarry
22 testified to that, Dr. Strauch testified to that, Dr. Sterman
23 testified to that. Additionally, residents in the State of New
24 York operate under the direct supervision of the attending, and
25 according to the case law in New York, as long as they're

1CDFGIL5

Giladi - redirect

1 operating under the direct supervision of the attending and
2 doing only what he tells them to do or allows them to do,
3 they're not liable, and the reason for that is it really puts a
4 pall on the ability of big teaching institutions to train
5 doctors.

6 So for all of those reasons, and certainly there's no
7 evidence despite a couple of comments by counsel that
8 Dr. Strauch was not in the operating room supervising this
9 surgery, the evidence is clear that he was doing the surgery
10 and Dr. Sterman was there in his assisting capacity, not
11 involved in neurolysis or decompression of the nerve.

12 THE COURT: Mr. Dinhofer, it is true that all the
13 testimony was that Dr. Sterman did no cutting.

14 MR. DINHOFER: That is not correct, your Honor.

15 THE COURT: What testimony contradicts that?

16 MR. DINHOFER: There was testimony that I read from
17 Dr. Strauch's deposition where he said the operative report
18 indicates what Dr. Sterman did, number one, and there were
19 twice readings to Dr. Sterman from his deposition where he said
20 this is what I did.

21 THE COURT: But he clarified what he meant.

22 MR. HEUBEL: Those were all --

23 MR. DINHOFER: It's up to the jury as to whether or
24 not they're going to accept his clarifications or not. You're
25 talking about dismissing a cause of action whether or not I've

1CDFGIL5

Giladi - redirect

1 adduced sufficient evidence to get the case to a jury. Those
2 statements, the three statements combined are sufficient. Plus
3 Dr. Irizarry, contrary to what counsel says, when I read to her
4 from her deposition, readily acknowledged that residents did do
5 cutting. I read that portion to her and she acknowledged that.

6 MR. HEUBEL: We acknowledge they did cutting and so
7 did they, but it's cutting of sutures, not of tissue.

8 THE COURT: She did clarify that.

9 MR. DINHOFER: That's qualification, but that's not
10 what she said at deposition. And the question becomes one of
11 what the jury wants to believe.

12 MR. HEUBEL: Judge --

13 MR. DINHOFER: And it's not Dr. Strauch who is
14 responsible, it's the hospital who is actually responsible,
15 that's the respondeat superior theory against the hospital.

16 THE COURT: Okay, Mr. --

17 MR. HEUBEL: But that's not --

18 MR. DINHOFER: That's not up to the resident and it's
19 up to the jury to decide who did the actual cutting and I
20 believe it's a question of fact as to whether or not
21 Dr. Strauch was even in the OR, and I think the facts are what
22 went on. Dr. Rousso said a senior surgeon would never have
23 done this, if in fact it had to happen, that there was a cut, a
24 senior surgeon should have been gotten to come back or to come
25 in. There's enough in there to get the jury on the question of

1CDFGIL5

Giladi - redirect

1 whether or not Dr. Strauch was even in the OR.

2 MR. HEUBEL: Judge, there's no evidence in this case
3 that Dr. Strauch was not in the OR. I think, your Honor, you
4 can at some point say there is not enough evidence for the jury
5 to decide that Dr. Sterman was involved in any way cutting
6 tissues on this patient. But again, even if he was, he was
7 under the direction, the supervision of Dr. Strauch, and under
8 that situation he's not individually responsible for that.

9 MR. DINHOFER: But they deny it. They deny that he
10 did it. They can't say he did it under the supervision if they
11 deny that he did it.

12 MR. HEUBEL: No, I'm saying --

13 THE COURT: One at a time.

14 MR. DINHOFER: The question is where does the lie
15 start and with whom? Dr. Strauch clearly said the operative
16 report indicates what Dr. Sterman did. That's enough to raise
17 the triable issue of fact as to whether or not Dr. Sterman did
18 the surgery.

19 MR. HEUBEL: Aside from the fact I disagree with that,
20 the law is that if he did it, whatever he did, under the
21 supervision of the attending at the surgery, he is not
22 individually responsible.

23 THE COURT: I believe that is essentially the law.

24 MR. DINHOFER: But if the lie is that Dr. Strauch was
25 there and Dr. Strauch did the cutting and the jury disregards

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Giladi - redirect

1 that and accepts the testimony of Dr. Strauch that the
2 operative report indicates what the jury did, that under the
3 doctrine of falsus in unum, which I requested be charged to the
4 jury, then the jury can disregard the entirety and disbelieve
5 the fact that Dr. Strauch was even there at the time. That's
6 their prerogative, your Honor. That's what the inferences
7 permit.

8 THE COURT: Not when there's so much evidence contrary
9 to that.

10 MR. DINHOFER: I'm sorry, if it's false, it's false.
11 That's exclusively within the doctrine of the jury. That's the
12 doctrine of falsus in unum.

13 THE COURT: I think I'm going to take the applications
14 under advisement and proceed.

15 MR. HEUBEL: Has plaintiff rested, by the way?

16 THE COURT: Not yet in front of the jury.

17 MR. DINHOFER: I want to hit the men's room before we
18 start and I said I wanted to have a moment to confer with my
19 client.

20 THE COURT: So we'll take two minutes.

21 MR. HEUBEL: Judge, can I ask with counsel's
22 permission to speak to the Court separately?

23 MR. DINHOFER: I don't understand how that's possible.

24 MR. HEUBEL: Well --

25 MR. DINHOFER: I mean, if you want to try to discuss

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Giladi - redirect

1 settlement, if that's your intent or something like that, sure.
2 If it's on the issue of settlement, sure, I'm always in favor
3 of that. But if it's about the conduct of the trial, that's
4 not appropriate.

5 MR. HEUBEL: I want some assurance that you have
6 rested, you are resting.

7 MR. DINHOFER: We haven't gotten there yet. The judge
8 asked me before. I want a moment to talk to my client to see
9 if I haven't forgotten something, and I wanted to go to the
10 bathroom. Once I do those two things, I'll give you my answer.
11 I said that very clearly. You might have been talking to your
12 clients when the judge asked me that question.

13 MR. HEUBEL: Judge, I understand your concern for the
14 jury, but I think this might be appropriate, once he has given
15 the assurance that they're going to rest that I have a
16 conversation with you, if it's agreeable to him.

17 MR. DINHOFER: Ex parte? I can't, unless it's for the
18 purposes of settlement.

19 THE COURT: Why don't you discuss between
20 yourselves --

21 MR. DINHOFER: You have to tell me what it's about.

22 THE COURT: Off the record.

23 (Discussion off the record)

24 (Recess)

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1 (In open court; jury not present)

2 THE DEPUTY CLERK: Judge entering.

3 Jury entering.

4 3:43 p.m.

5 THE COURT: Good afternoon, ladies and gentlemen.

6 THE JURY: Good afternoon.

7 THE COURT: You may be seated.

8 Okay, Mr. Dinhofer.

9 MR. DINHOFER: Yes, your Honor. Much to everyone's
10 relief, at this time plaintiff rests.

11 THE COURT: Okay, plaintiff has rested. That means
12 that's the end of the plaintiff's case.

13 We took a little longer, because we are working. We
14 do have legal issues that come up, as I've told you, and now we
15 have some other legal issues to deal with, so I'm going to let
16 you go early today. But please plan to come in at 9:30
17 tomorrow morning, as you did this morning, and we'll continue
18 from there, and hope to be -- hope to be done with the evidence
19 tomorrow, which would mean you'd hopefully begin deliberating
20 tomorrow afternoon.

21 Thank you again for your patience and time and
22 concentration on the case.

23 (Jury exits)

24 (In open court; jury not present)

25 THE COURT: Okay, you gentlemen may step out.

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1 MR. DINHOFER: Thank you.

2 (Recess)

3 4:30 p.m.

4 THE COURT: Okay, we're back on the record. I
5 understand the parties have something to tell me.

6 MR. DINHOFER: Yes, your Honor. The parties have
7 agreed to settle this action in the net payable sum of
8 \$600,000. With that, plaintiff will be providing the defendant
9 with a general release.

10 MR. HEUBEL: With a joint tortfeasor clause.

11 MR. DINHOFER: A stipulation of discontinuance.

12 MR. HEUBEL: Separately as to Dr. Sterman, and a
13 separate stipulation of discontinuance with prejudice as to
14 Montefiore and Dr. Strauch.

15 MR. DINHOFER: And they also request that a hold
16 harmless letter with regard to any liens, of which there are
17 none.

18 MR. HEUBEL: There is a --

19 MR. DINHOFER: A subrogation interest held by the
20 1199, and I have to debate with them whether or not they're
21 entitled to that under the 355 of the general obligation law
22 that was passed a year ago, last October.

23 MR. HEUBEL: And the understanding is that the
24 plaintiff will be responsible for any and all liens that there
25 are, attributable to the --

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1 MR. DINHOFER: There are no liens. It's just that one
2 subrogation interest by the insurance carrier, it's a
3 contractual right of action, it's not a lien under the law.

4 MR. HEUBEL: We also have an agreement that the
5 proceeds of settlement will not be paid for up to 90 days, and
6 the hold harmless agreement you talked about is in a particular
7 FOJP form, which I will send to you.

8 MR. DINHOFER: Okay.

9 MR. HEUBEL: Which includes an agreement not to
10 publicize.

11 MR. DINHOFER: Okay. Just so you're aware, some of
12 those hold harmless agreements require me as attorney to sign.
13 A city bar ethics opinion said that's inappropriate, that's
14 called Champerty, and as an attorney we're not allowed to sign
15 those interests, because we don't have those rights and
16 interests.

17 MR. HEUBEL: There are parts of the hold harmless lien
18 that you're not aware of any liens and you won't publicize, and
19 we'll arrange that you can agree to hold --

20 MR. DINHOFER: That's in the form of a settlement
21 agreement, that I understand.

22 THE COURT: You mentioned a --

23 MR. DINHOFER: I'm talking about the fiscal, I'm not
24 allowed --

25 THE COURT: You mentioned an 1199 issue, that's

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1 something that --

2 (Continued on next page)

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1 MR. DINHOFER: 1199 is his union.

2 THE COURT: Okay.

3 MR. DINHOFER: Okay, and they have a small claim of
4 less than \$6,000, that is to say for the medical bills for
5 Dr. Strauch's procedures that they believe they're entitled to
6 reimbursement from. It is the law in malpractice cases, of
7 course, that in the instance of a favorable verdict the
8 defendant is not allowed to keep the proceeds of the procedure
9 that he did inappropriately, so therefore the insurance company
10 believes to be a subrogation which is a contractual remedy that
11 they're entitled to it. However, the passage of GOL355 last
12 year specifically states that unless it was a qualified ERISA
13 plan, which the 1199 is not, then they are not entitled to it.
14 However, I may have given them a letter of representation many
15 years ago that may, and I don't know if it's been decided in
16 the courts, how that affects a subsequent enactment.

17 THE COURT: Okay.

18 MR. DINHOFER: That's just an issue for debate with
19 1199 that I will use in reducing their lien.

20 THE COURT: In any event, however, that's resolved,
21 that's all on you. It doesn't affect the settlement.

22 MR. DINHOFER: Yes.

23 MR. HEUBEL: It's my understanding that the plaintiff
24 has never been a recipient of Medicare or Medicaid?

25 MR. DINHOFER: That's correct.

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1 THE COURT: And you said up to 90 days for payment?
2 One payment?

3 MR. HEUBEL: Up to 90 days from receipt of these
4 documents properly executed.

5 MR. DINHOFER: I would hope we'll have those documents
6 done within the week, before the end of the week.

7 MR. HEUBEL: I'll have them to you tomorrow.

8 MR. DINHOFER: Good.

9 THE COURT: And I assume the insurance company is
10 fully on board with this and there's no need for separate
11 representation by them.

12 MR. HEUBEL: That's correct.

13 THE COURT: Okay. That seems adequate in terms of
14 documenting the settlement. Is there agreement in terms of
15 confidentiality, advertisement, that sort of thing?

16 MR. DINHOFER: That's in the documents and I have no
17 problem with that.

18 MR. HEUBEL: Counsel has agreed.

19 MR. DINHOFER: My client has no problem with that
20 either.

21 MR. HEUBEL: Counsel and his client I believe are in
22 agreement not to publicize the terms of the settlement.

23 MR. DINHOFER: Correct. He may tell his wife and
24 accountants for whatever purposes need be, but beyond that it
25 will go no further. And I generally tell my clients not to

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1 make any mention of it, too, because when the world finds out
2 you have money they feel they're entitled to a part of it, as
3 you know from all the lottery people.

4 THE COURT: Okay.

5 MR. HEUBEL: Thank you, Judge, for all your --

6 MR. DINHOFFER: It was your first trial, I understand?

7 THE COURT: My first trial.

8 MR. DINHOFFER: I hope it's a memorable one.

9 MR. HEUBEL: Judge, it was my first trial in federal
10 court, too. I couldn't have had a better time. The first time
11 I stepped into this case was the first time I ever stepped into
12 a federal courthouse and believe me there are things that are
13 fabulous about it, but there are lots of rules that we state
14 lawyers don't deal with on a routine -- are you taking this
15 down?

16 MR. DINHOFFER: I think we're done with the record. I
17 think we can go off the record.

18 (Discussion off the record)

19 (Adjourned)

INDEX OF EXAMINATION

Examination of:	Page
RONI GILADI	
Direct By Mr. Dinhofer	835
Cross By Mr. Heubel	912
Redirect By Mr. Dinhofer	971

PLAINTIFF EXHIBITS

Exhibit No.	Received
16	888

DEFENDANT EXHIBITS

Exhibit No.	Received
B	859